

No. 15714

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United States  
Court of Appeals  
for the Ninth Circuit

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TALON, INC., Appellant,  
vs.

UNION SLIDE FASTENER, INC.,  
Appellee.

UNION SLIDE FASTENER, INC.,  
Appellant,  
vs.

TALON, INC., Appellee.

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Transcript of Record

In Five Volumes

VOLUME III.

(Pages 801 to 1224, inclusive)

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division

FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK



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(Testimony of Philip Lipson.)

Q. I believe that you have before you a copy of the Silberman patent in suit '793?

A. I do.

Q. This patent relates to a machine for manufacturing zipper elements. Have you read this patent?

A. I will admit that I have read this patent but not recently, the description inside.

Q. Are you familiar with the drawings in the patent?

A. I am familiar with the drawings, the description—pardon me, your Honor, I would say it is rather boring because for a layman it keeps on repeating the same thing.

The Court: We won't mention the claims in the patent.

The Witness: Okay.

The Court: By the way, does your record show what your capacity is with the Union Slide Company? Are you now the president?

The Witness: Yes, your Honor. [718]

The Court: And a major stockholder in the company?

The Witness: Yes, your Honor. Not the major stockholder. I hold 40 per cent of the stock.

The Court: 40 per cent?

The Witness: Yes, sir.

The Court: And the balance of the stock is held by members of your family or relatives?

The Witness: Members of the family.

The Court: Entirely? Is it a family corporation?

(Testimony of Philip Lipson.)

The Witness: There is a preferred stock which is held by outsiders—that is some are relatives and some are friends.

The Court: But you are the president?

The Witness: Yes, your Honor.

The Court: All right.

Q. (By Mr. Mockabee): Do you understand that the machine shown in the Silberman patent is intended for the manufacture of zipper elements from a strip of flat stock upon which operations are performed to form individual elements which are fed to and clamped upon a tape approximately at the time of severing the end element from the strip? A. Yes.

Q. That is the general operation of the machine? A. That is correct.

Q. Have you ever seen any similar types of [719] machines as compared to that shown in the Silberman patent?

A. Similar in function or in general design?

Q. In its mechanical, functional elements to produce the operations I have previously outlined?

A. Yes.

Q. Where have you seen them?

A. I have seen it at the California Slide Fastener Company.

Q. Were the machines at California Slide Fastener Company, insofar as its essential operating parts are concerned, built like the elements shown in the Silberman patent?

A. The answer I gave before—the California

(Testimony of Philip Lipson.)

Slide Fastener had besides the Silberman type machines, also another type of machine which functionally was the same as the Silberman, but it didn't perform identically in that it did not have two stringers produced. It was what we call a single-header machine. But functionally it operated the same as the Silberman type machine.

Q. What type of fastener element did, what you would term the Silberman type of machine, produce?

A. A round shoulder element.

Q. Can you explain the difference between a round shoulder element and the other kind of fastener element?

A. The round shoulder element from the widest part, which is about at the middle of the element, it tapers [720] downward in an arc shape toward a point where it joins the tape, the end of it. I believe I have——

Q. Now, you are speaking of the end of the element, the legs? The element is roughly "U"-shaped. You mean the closed end or the open end?

A. When the element is closed on the tape.

The Court: Well, draw us a picture of it. There is a round shoulder element and what is the other kind?

The Witness: A square shoulder element.

The Court: Draw a picture of each of them.

The Witness: It is shown in the sketch I presented a moment ago, your Honor.

The closed part of it is shown in dotted lines

(Testimony of Philip Lipson.)

underneath and the other one is shown at the top.

The Court: You are referring now to Exhibit AW?

The Witness: Yes. And this is when the round-shouldered element is closed. The semi-dotted lines present the final shape of the element after it is closed and in this one it is a square.

The round-shouldered one is also shown in Silberman—in the patent itself.

The Court: Just a minute. The dotted lines on the Loew zipper show that the shoulder is adjacent to the legs that close around the element, are square in shape?

The Witness: That is correct. [721]

The Court: While your diagram of the Silberman zipper shows a rounded area in that portion. Is that what you have in mind by round shoulders and square shoulders?

The Witness: Yes, sir.

The Court: And you say the Loew machine would make a square shoulder?

The Witness: That is right.

The Court: Do you contend you make a square shoulder zipper at your place?

The Witness: Yes, your Honor. This is one of them.

The Court: Is this one of yours?

The Witness: No, this is a Silberman type made on the machine used by California Slide Fastener.

(Handing object to the court.)

Q. (By Mr. Mockabee): I believe the blueprint,

(Testimony of Philip Lipson.)

Exhibit AV, shows in dotted lines the square shoulder element such as produced by the defendant in its closed position.

The Court: Yes, I noticed that.

The Witness: And the other exhibit, too.

The Court: Yes, I noticed that.

Q. (By Mr. Mockabee): Is there any difference in the advantage of one shape of element over the other? A. Yes, there is.

Q. Would you explain that?

A. The square shoulder in this zipper that I am holding [722] now, forms a guide for the slider as it goes down so it cannot move sideways. It cannot distort the zipper.

In the round-shouldered element there is no such guide except the fact that the slider is tight on the zipper.

In other words, if one was to turn the slider sideways and move it up and down fast you would distort the zipper.

Q. When you speak of turning the slider sideways do you mean people actuating sliders don't always move them truly vertically, is that right?

A. Yes.

The Court: Wouldn't it be merely a matter of the shape of the slider? In other words, I am holding now a zipper element here or a zipper where the inside of the slide fastener is sort of round shape to go over the round shoulder?

The Witness: That is correct.

The Court: And I am holding one here where



(Testimony of Philip Lipson.)

the inside is more square shaped to go over the square shoulder. Isn't it merely a matter of the shape of the slider that is used with the zipper?

The Witness: The only difference, your Honor, is they have to use a round shoulder—a rounded shape instead of the slider. However, in this slider there isn't anything to hold it sideways except that the slider has to be tight.

The Court: In other words, your point is that where there are square shoulders the slider can fit?

The Witness: It holds it much better.

The Court: I see.

The Witness: That is only one reason. There are other points too in the difference.

Q. (By Mr. Mockabee): Would you name them?

The Court: You had better mark these, Mr. Clerk. The black one is a square shoulder zipper and the other is a round shoulder zipper. Mark them for identification.

The Clerk: Defendant's AX and AY for identification.

(The objects referred to were marked Defendant's Exhibits AX and AY for identification.)

The Court: I have an engagement and it will be necessary to leave a little early.

We will adjourn now until 2:00 o'clock.

(Whereupon, at 11:45 o'clock a.m. a recess was had until 2:00 o'clock p.m. of the same day.) [724]

March 9, 1955, 2:00 O'Clock P.M.

PHILIP LIPSON

the witness on the stand at the time of recess, having been heretofore duly sworn, was examined and testified further as follows:

The Court: The clerk has marked for identification AX, the zipper which the witness characterized as a square shouldered zipper fastener, zipper unit. And I understand you to say that it was made by your company?

The Witness: Yes, sir.

The Court: It will be received as AX in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit AX.)

The Court: The clerk has also marked as AY an example of so-called round shouldered zipper.

The Witness: Yes.

The Court: Do you know what company made this?

The Witness: California Slide Fastener Company.

The Court: Received in evidence as AY.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit AY.)

The Court: Proceed. [725]

Direct Examination—(Resumed)

Q. (By Mr. Mockabee): Mr. Lipson, I would like to refer back to the discussion of the projection and recess in the Poux patent.

What in your opinion would be the result if that

(Testimony of Philip Lipson.)

particular step of the Poux method were reversed with regard to the projection and the recess?

A. I looked at the Poux patent '017 during lunch hour to analyze whether it could be done or not, and I found this: If a punch—it may be called a die, because it is at the lower portion—which forms the recessions in the rod is employed at the bottom, the method shown here does not provide a means or a way of lifting that rod over that projection in the punch in order to move it forward. It would have to be a projection that is at a much lower point, that is considerably lower, than the bed over which the rod slides. Therefore, means have to be built to bring that rod downward in order to make that impression for the recession in the rod. And in employing a rod which does not bend easily, that couldn't be done. And the method or principle shown in this drawing and in the patent does not provide for any such operation.

Q. Regarding the side notching mechanism, what would be the effect if it were attempted in the manner taught by the Poux method?

A. Notching punches on the sides, if the rod [726] between the two notching punches was solid, there would be no problem, but as shown at Fig. 2 of the Poux patent '017, the rod has been punched out there with the key-hole slot, therefore you do not have a solid rod there, and the effect would be that the punches and notching in their downward movement would also tend to squeeze the key-hole slot together, and if the rod isn't solid



(Testimony of Philip Lipson.)

and has a certain way of giving, it would cause chattering of the punches, what we call it in punch method operation, it would cause chattering of the punches, because they will not engage a solid piece of metal, but a metal that can give. [727]

Q. Now, I believe you testified this morning regarding the collapsing of the keyhole slot by the cutter 23 when the cutter is being actuated.

Would this collapsing force be uniform from opposite sides of the rod or not?

A. Normally not.

Q. What would be the effect?

A. The effect would be that the side which is being moved the most and which is the part facing us as we look at the drawing——

Q. The part which is contacted by the movable cutter?

A. That is right. Well, the movable cutter does not contact the part which is notched. It contacts the rod immediately after that. But the effect is transferred into the part that is held against the anvil and the effect would be that that particular half of the rod between this, the front end and the keyhole would collapse more and turn more than the other side.

Q. Would that displace the keyhole transversely of the rod?      A. Yes.

Q. What effect would that have upon the operation of the spreader tool 27?

A. The spreader tool being in a fixed position in its vertical movement up and down, would invari-

(Testimony of Philip Lipson.)

ably—I am not [728] saying often, but would invariably hit on the solid part instead of one the keyhole slot, on the solid part of the rod and distort it.

Q. I refer you to the blueprint Exhibit AV which shows a strip such as produced in your machines and also the patent to Loew——

A. I haven't got the Loew patent here.

Q. In the patent to Loew you will note a series of points at the end of the strip formed by the notching procedure.

On the blueprint Exhibit AV you will note that the portions of the strip between adjacent notches do not come to a point at the edge. Is there any reason for this difference?

A. Yes. The reason for it is in using a metal which comes to a point, when that metal is later squeezed together the ends come to a sharp point and they form a very sharp zipper edge which sometimes the person who uses it on a dress can scratch her fingers with it.

In 1949—shortly after I disassociated myself with Loew, which was March 21, 1949, I ordered metal which was ten thousandths narrower than the one before and have made certain changes in the machine whereby I was getting a little bevel on the edge, as shown on this drawing AV, a little bevel over here. [729]

Now, this gave me a much smoother zipper and at the same time I saved seven and a half per cent on the metal consumption in making zippers.

(Testimony of Philip Lipson.)

If I may state so, or would that be out of order, that this procedure was later followed by other manufacturers in the zipper industry.

Some of them use today not quite as narrow a metal as we do but they all went to the point of having a bevel on the edge.

Q. In other words, you not only saved the amount represented by the, what we might term the cut-off point, but an equal width of metal at the outside of the notch, is that not true?

A. The only metal that is saved is on the whole width of the wire. Instead of using wire which was 130/1,000ths wide we are using wire that is 120/1,000ths wide and we are getting the same dimension on the zipper.

The only difference is that we have a little bevel which we wanted to get on the bottom of the element.

In this drawing, AV, this bevel is shown rather large it may seem, but this drawing is blown up 50 times the size of the element.

The Court: Put an arrow at the place of the bevel and *right* on your Exhibit AV the word "bevel."

The Witness: Yes, your Honor. At this point there is [730] not a bevel yet. That is part of the strip.

Mr. Leonard Lyon: That forms the bevel.

The Witness: Yes, sir, that forms the bevel.

The Court: Well then, put an arrow and say "will become the bevel."

(Testimony of Philip Lipson.)

The Witness: Well, I can put it in here. It is the same thing. I will point it down this way.

The Court: All right, "will become the bevel."

Now, in the operation of your machines do the jaws contact the legs at this point, which we will mark with an X—put an X right there on Exhibit AV. Do they contact the legs, the jaws contact the legs at that point much as in the same machines in which you show the Loew jaws—the jaws of the Loew patent contacting the edges in Exhibit AW?

The Witness: The contact point is at this point here where it is flat. [731]

The Court: All right. Put "Y" down here now. I was wrong in that "X." That is the completed position.

The Witness: Yes, sir, that is the completed position.

The Court: The jaws contact right where the bevel is?

The Witness: Yes.

The Court: Which on Exhibit AW would correspond to the point immediately touching the closing jaw?

The Witness: It would be a little nearer, because I drew this here according to the Loew patent. The Loew patent shows a sharp edge.

Q. (By Mr. Mockabee): In your previous reference to examination of machines of California Slide Fastener Company, what was the reason for your examination of those machines?

(Testimony of Philip Lipson.)

A. The California Slide Fastener was organized originally by two men who were not mechanics.

Mr. Leonard Lyon: Well, I don't believe there has been any foundation for this. Maybe there is a foundation, but it doesn't appear in the record.

The Court: It doesn't sound to me to be in response to the question.

Why did you go over and examine the California machines?

The Witness: They called me for assistance and advice, because they didn't understand the machines.

The Court: There is your answer.

Q. (By Mr. Mockabee): Were the machines working at all? [732]

A. They were. They called me on a number of occasions asking my advice. They used to put the punches and dies in, and in five minutes they would be dull. And the products that they manufactured were not very desirable on the market, from my own experience I know that, and they called me in for advice. They had an engineer who was present at the time when I gave them the advice. I examined their punches and dies, and I showed them that they were made wrong. In a punch——

The Court: You have answered the question. Let's go on to something else.

Q. (By Mr. Mockabee): Was not California Slide Fastener a successor to Cap-Tin?

Mr. Leonard Lyon: Does the witness know that of his own knowledge?



(Testimony of Philip Lipson.)

The Witness: I do.

Q. (By Mr. Mockabee): Do you know those interested in Cap-Tin?

The Court: The witness said he knew of his own knowledge, but what is the answer? Was California a successor to Cap-Tin Company?

The Witness: Yes, your Honor.

The Court: Now read the next question.

(The question referred to was read by the reporter, as follows: "Q. Do you know those interested in Cap-Tin?") [733]

The Witness: I would have to state that this was brought out at the time when the deposition was taken by plaintiff's attorney, the deposition of me, and they brought the point out at that time, they asked me the question, did I know that Cap-Tin was the predecessor of California Slide Fastener.

The Court: What did you say?

The Witness: I said at that time that I didn't know.

The Court: How do you know now?

The Witness: They told me so.

The Court: Well, they didn't tell you by asking you a question.

The Witness: They stated later on that that was the case.

The Court: Is there any dispute about this fact?

Mr. Leonard Lyon: I don't think so, your Honor, as to the fact, the California Slide Fastener Com-

(Testimony of Philip Lipson.)

pany is the Cap-Tin Company, as I understand it, under a change of name.

Is that correct?

The Court: You can confer together off the record.

Mr. Leonard Lyon: There was a subsidiary or a division of the Cap-Tin Company that was organized to operate in California under the California Zipper Company name, so Mr. Meech informs me.

The Court: If that is a fact, then there is no problem here, is there? [734]

Mr. Leonard Lyon: That is correct. I couldn't understand the witness' testimony that he knew these facts, because on his deposition we asked him and he didn't know it.

The Court: He explained that.

The Witness: I didn't know it before then.

The Court: Now we still have a pending question. Do you know who were interested in Cap-Tin Company, or the subsidiary which became California?

The Witness: The only three that I knew of were Mr. Tobah, I forgot his first name, Mr. Eisenberg, and Mr. Louis Staff.

Q. (By Mr. Mockabee): When you first observed the machines of California Slide Fastener Company, and from your experience in observing the operation of zipper manufacturing machinery, what was the approximate speed of those machines?

A. From observation, and I wasn't given a chance to measure it or see exactly, but from ob-

(Testimony of Philip Lipson.)

serving just the speed of the rotation of the machine, I would judge it was between 1,000 and 1,200 r.p.m.

Q. As a result of the request of California to observe their machines, did you actually suggest any changes or improvements in them?

A. Yes, I did.

Q. Were they followed out?

A. They were. [735]

Q. After——

The Court: Does the record identify what the California machines were, what style machines?

Mr. Mockabee: I believe the witness testified this morning regarding their general functional elements as being similar to the type of machine we have been calling the Silberman machine.

The Court: Oh, yes, I recall.

Q. (By Mr. Mockabee): After these changes and improvements were incorporated in California Slide Fastener machines, could you observe any difference in the speed of operation?

A. I personally didn't observe it. I could only state what I was told, and I understand that that is hearsay.

Mr. Leonard Lyon: I don't think on a matter of this kind we should have a statement out of court of somebody else, your Honor.

The Court: That is just what the witness said. Keep your voice up. I can hear you here. I will get further away from you. But counsel can't hear you.



(Testimony of Philip Lipson.)

Read the answer, Mr. Reporter.

(Answer read by the reporter.)

Mr. Leonard Lyon: His understanding is the same as mine.

Q. (By Mr. Mockabee): Then you did not see the machines in operation after they were improved? [736] A. No.

Q. Were you paid anything by California Slide Fastener for giving them the suggestions that you did?

A. No. I just felt that they are friendly competitors, we exchanged favors in many ways, and I felt that it is a matter of live and let live, and I was glad to help them out, although some of my key employees thought I was a foolish businessman.

The Court: Of course the purpose of that testimony is to make the witness and the president of the Union Slide Company appear as a Sir Galahad who travels around fixing competitors' machines, is that the purpose of the testimony?

Mr. Mockabee: No. The purpose was that he was not selling his information as part of his business.

The Court: All right.

It would also have a bearing upon his ability as a mechanic and tool maker.

Mr. Mockabee: He was consulted by the trade.

The Court: Go ahead.

Mr. Leonard Lyon: I wonder if we are entitled to draw the inference, from the testimony, that the

(Testimony of Philip Lipson.)

information was worth just what was paid for it?

Mr. Mockabee: That was only one question.

The Court: We are off in the field of speculation now.

Mr. Mockabee: I think we will have to consider more than [737] that one question by itself.

If the court please, the defendant witness feels that he can much better discuss some features of the Silberman machine if he were in the presence of the machine in Judge Hall's court room, and the witness also wishes to identify the machine of Union Slide Fastener Company.

The Court: How near the end of his testimony are you?

Mr. Mockabee: I have got two or three other major things to bring out. [738]

The Court: Well, the point is do you want to do it now or toward the end of his testimony?

Mr. Mockabee: We could jump off to something else at this point and jump back again.

The Court: Well, then let us adjourn over to the machines in Judge Hall's court.

However, the reporter will have to be there and we will have to get some kind of orderly basis for a place where the reporter can work and where he can hear what is being said, unless we are going to take the machine further apart and identify the parts that you are talking about for the record.

Unless you want to tag some more parts we will adjourn over to Judge Hall's courtroom and proceed with that part of the testimony. What will we

(Testimony of Philip Lipson.)

need? A copy of the Silberman patent? Is that all?

Mr. Mockabee: I think we should also have a copy of the Poux patent.

The Court: What about Exhibits AV and AU? Will they be necessary?

Mr. Mockabee: There may be some reference made to them.

The Court: Let the record show we are now in Judge Hall's courtroom where three different machines have been placed. You may proceed.

Q. (By Mr. Mockabee): Mr. Lipson, I will ask you if you can identify the machine, Plaintiff's Exhibit 5? [739] A. Yes.

Q. What type of machine is it?

A. It is a double-header chain production machine, zipper chain production machine.

Q. Is that a machine similar to the type which you observed and added improvements to at California Slide Fastener Company?

A. Only as far as the functional parts are concerned—that is in producing a zipper element. Otherwise there is very little similarity between them.

The Court: You mean by functional parts, the parts concerning the punching and where the fastening occurs are similar while the rest of the machine is dissimilar?

The Witness: That is right.

Q. (By Mr. Mockabee): What about the ram and ram block?

A. There is no ram or no ram block.

The Court: Where?

(Testimony of Philip Lipson.)

The Witness: In this machine. This is a punch holder of a little more weight, but there is no ram or gib. The gib is the bed in which the accused machine—the gib is this part here with these two “V”-shaped seats here and the ram block slides in this seat up and down.

Exhibit No. 5 does not have that. It has neither gib nor the “V”-shaped parts in the ram block. It has a heavier and larger size punch holder block.

Q. (By Mr. Mockabee): How is that supported?

A. It is supported by means of flex-steel bars. I believe that is the name which was given to me by one of the experts for plaintiff.

It is called flex-steel bars. These two hold that in a position where it swings on an axis. This is the fulcrum of the axis and this is on which it swings in an arc. It does not swing straight up and down. It is true that it is a very small arc but nevertheless it is an arc.

Q. And a ram and ram block move in a truly vertical direction? A. Yes.

The Court: I thought you said they moved in an arc.

The Witness: This does move in an arc.

The Court: And that is the ram block?

The Witness: This is a punch holder block and the ram block has to move in a gib in a vertical position, either up or down or it can move at an angle or for that matter even in a horizontal position but it moves in a fixed bed or straight line.

Q. (By Mr. Mockabee): A ram block moves in

(Testimony of Philip Lipson.)

a direct linear direction whereas the element in Exhibit 5 which supports the punches, according to your testimony, moves actually in an arc, is that true? A. That is correct. [741]

Q. Are there any other features of the machine which are different from those you observed on machines at California Slide Fastener?

A. The shaft, the main eccentric shaft underneath does not run in a bed of oil. It is an eccentric shaft as is used on an ordinary press except that it is situated underneath the bed or base instead of above the base as it is shown in a similar machine there.

The Court: By "the similar machine" you mean the accused device?

The Witness: Not the accused device but that is a typical eccentric press of a small size.

The Court: Referring now to a third machine you moved in here.

The Witness: Yes, your Honor, in this machine.

The Court: And by "this machine" you mean the accused device?

The Witness: The accused machine. The eccentric shaft is within the housing, main housing of the machine and runs in a bath of oil.

The connecting rods in this machine are connected inside of the housing of the machine.

In this machine, Exhibit 5, the connecting rods are not in a housing and these connecting rods serve a different purpose than these others. [742]



(Testimony of Philip Lipson.)

The Court: You are talking about the connecting rods in Exhibit 5?

The Witness: Yes, in Exhibit 5. This in moving the punch holder block up and down also acts as a stabilizing factor so it will not move forward.

And I want to point out at that time I did not have a chance to observe this machine thoroughly—only from just glancing at it. And I may make certain mistakes in pointing out details of this machine.

I have just noticed that the bars underneath which seem to me may act to prevent the arc movement that I was talking about.

It is really hard to give testimony on a machine that one has observed for five minutes or six minutes or whatever it took to run it.

You can state better on the machine if you have hours to take it apart and see it function.

Q. (By Mr. Mockabee): Well, Mr. Lipson, would you say that a machine constructed in accordance with Exhibit 5 and having the flex bars you refer to, without considering any question of the true direction of movement of the punches carried by the punch block, would be capable of operating at a greater speed than a machine provided with a ram block guided in gibs?

A. In my opinion, yes, it would be. One could [743] operate it much faster than the other one.

Q. Do you notice anything on Exhibit 5 for removing waste material from adjacent the punches?

A. Yes.

(Testimony of Philip Lipson.)

Q. What is it?

A. There are two square holes here—this hole and here. This is at one die and undoubtedly the same thing is at the other die which we haven't taken apart.

These fit in with corresponding slots in the die housing. When the die housing is inserted they are right opposite the holes in the die housing—the holes in the die housing are opposite the holes in here.

Q. What is the function of those square holes or apertures?

A. The function of the square holes—they are normally connected with the channel that leads downward which is connected in this particular case, in Plaintiff's Exhibit 5, they are connected with copper tubing which in turn is connected with a jar and to this jar is connected a vacuum pump. There is a connection in the back here. There is a vacuum pump which exerts a pull and pulls the chips into these channels and from there into the container underneath. [744]

Q. (By Mr. Mockabee): Did you observe a vacuum pump connected to Exhibit 5 one day last week when the machine was demonstrated?

A. Yes, I did.

Q. Do you know the origin of this vacuum chip clearing attachment on such a machine?

A. When you say the origin, I can't answer that. It might have been originated 300 years ago.

(Testimony of Philip Lipson.)

Q. Do you know who first put such a device on a zipper machine of this type?

Mr. Leonard Lyon: Of his own knowledge?

Mr. Mockabee: Yes.

The Witness: I don't.

Q. (By Mr. Mockabee): Comparing Exhibit 5 with the machine adjacent thereto — and we will mark it for identification as Defendant's Exhibit AZ.

The Court: The accused device?

Mr. Mockabee: The accused device.

The Court: May we have the same stipulation, that the accused device may be returned to the custody of the defendant to be produced at such times as may be necessary in the future?

Mr. Leonard Lyon: That is satisfactory to me, your Honor.

Mr. Mockabee: Yes. [745]

The Court: AZ received in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit AZ.)

(The following question was read by the reporter: "Q. Comparing Exhibit 5 with the machine adjacent thereto——")

Q. (By Mr. Mockabee) (Continuing): ——can you point out on Exhibit AZ improvements thereon made by you after you became interested in Union Slide Fastener, which are similar to or the same as elements of Exhibit 5 of plaintiff?

A. You asked me a question which pertains to what I installed——



(Testimony of Philip Lipson.)

Q. Or had installed.

A. —or had installed under my direction. You will note in this punch holder block there are grooves in here (indicating).

The Court: Starting down vertically and then winding off in a half circle.

The Witness: Yes. When I saw the first machine of this type, it had little copper tubes bent in this manner. They were squeezed into the notching channels of the punch, and it was connected with a compressor, which pressed, which blew compressed air into the little tubes, and blew the chips away from under the punch into these channels that were provided, and into those tubes. When I wanted to change this, it was [746] my idea that in blowing a chip you cannot control it where it will be blown. There are cases when the punches are adjusted a little bit too high, they do not go enough under the surface, so that there isn't enough of a pause there to give a chance for the chip to be blown in, and then the chips fell on the dies and ruined the dies. I had the idea that instead of blowing we could vacuum it, we would vacuum the chips out.

I bought these tanks here from government surplus for \$1.00 apiece, and I connected these four, they are soldered in, I connected these four—

The Court: Hoses.

The Witness (Continuing): —four hoses, and this pipe here with the union was connected to a series of pipes which start from the vacuum pump.

(Testimony of Philip Lipson.)

Q. (By Mr. Mockabee): In other words, that is your vacuum connection?

A. That is our vacuum connection. When this gets fairly filled up with chips, we open this up, and this is removed, and inside are the chips that are accumulated.

This machine was taken off from our production line to be brought to the court.

Q. With regard to the vacuum——

The Court: . This vacuum case and the four rubber hoses extending from it will be called Exhibit AZ-1, and received in evidence. [747]

The same stipulation, that it may be returned to the custody of the defendants to be produced when required?

Mr. Leonard Lyon: Yes, your Honor.

The Court: All right.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit AZ-1.)

Q. (By Mr. Mockabee): Had you seen a vacuum chip clearer on any other zipper machine before you applied it to yours? A. No.

Q. In other words, then, insofar as you have knowledge, you were the originator of the vacuum chip clearer on zipper machines?

Mr. Leonard Lyon: If your Honor please, I object to that question. He has already answered all he knows about it. He never has seen one before.

The Witness: I was going to say the same thing.

The Court: The question has been answered, but the answer may go out. The answer will remain that

(Testimony of Philip Lipson.)

he never saw it before he put it on the machine.

Q. (By Mr. Mockabee): Is the frame of the accused device, Exhibit AZ, different from the general frame structure of Plaintiff's Exhibit 5?

A. What is that question? [748]

(Question read.)

The Witness: Will you please clarify the question? What do you consider a frame?

Q. (By Mr. Mockabee): I am referring to the base portion, the upstanding castings which carry the various moving parts of the machine, the general frame members, skeleton of the machine.

A. I would call that the body of the machine.

Q. The body of the machine.

A. It is entirely different.

Q. What is the weight of your machine?

A. 500 pounds, assembled, but without the container or the chips. The machine itself.

The Court: Can we stipulate to the weight of Exhibit 5?

Mr. Leonard Lyon: I will find out what it is.

Does anyone here know what the weight of Exhibit 5 is?

Mr. Meech: About 1500 pounds.

The Court: The record will show that Exhibit 5 has a metal piece immediately adjacent to the flooring of about an inch thick of steel or iron, and which is about a little over three feet square, while Exhibit AZ stands on four legs of a frame; that Exhibit 5 has extended upward from the iron base apparently two pieces of angle iron about eight

(Testimony of Philip Lipson.)

inches wide, and the angle portion of the iron is about 2½ inches wide extending upward for about 18 inches, while Exhibit AZ has [749] sort of a frame structure with metal members going upwards, but with openings between what amounts to the legs on either side, and that generally the machine itself set upon the body Exhibit 5 seems to be a much bigger and heavier machine than the machine set upon the body of Exhibit AZ.

Q. (By Mr. Mockabee): Has the machine, Defendant's Exhibit AZ, been in operation for any considerable length of time?

A. This particular model that is on exhibit here is our latest machine and has been in operation for approximately two years.

Q. Do you have any other machines in your plant built like this machine, Exhibit AZ, which have been in operation longer?

A. Yes, I do.

Q. Will you tell me approximately their length of operation?

A. The oldest one is the very first machine that I found at the Union Slide Fastener Company factory when I entered. But that machine has been altered, and in that I incorporated all the improvements and changes that I have put in newer machines. But its outside appearance, what you call the framework or the body, is generally similar to this one. It may have a different angle, which it does have. One of the improvements that I made was to change the angle of [750] this bracket so

(Testimony of Philip Lipson.)

that the tape, instead of coming down at a sharp angle — I am exaggerating the angle — comes out fairly vertical, a very slight angle. The importance of this is that when the tape, which is in a fixed position in this die, is moved away at such an angle here at a time when the elements are clamped on, they can also cause a herringbone like I stated before.

Q. Do the machines exemplified by Exhibit AZ require frequent shutdown for repair or adjustment? A. No.

Q. What is the usual reason for shutting down a machine?

A. One of the most common reasons for shutting down a machine is changing the color of the tape that is there.

Q. I mean with regard to any attention required by the operating parts of the machine.

A. The removal of the punches and the dies for resharpening after they get dull. And that depends on the metal used. We get a production of from—normally—from 10 to 12 days on aluminum without resharpening, and from four to five days on brass.

The Court: Can you give us something other than days? The number of zippers?

The Witness: Our normal production on a machine like this here, considering the efficiency of the machine, is in the neighborhood of fifteen to sixteen hundred yards a day. [751] That is consid-



(Testimony of Philip Lipson.)

ering that the machine operates at an efficiency of between 85 and 90 per cent.

Q. (By Mr. Mockabee): Without going into a detailed comparison, are the elements of Plaintiff's Exhibit 5, which you identified and discussed this morning, which had been removed from Exhibit 5, also found in the accused device, Exhibit AZ?

Mr. Leonard Lyon: I think that is too indefinite, your Honor.

Mr. Mockabee: I was just trying to condense it a little bit.

The Court: Objection overruled. Yes or no, are they found or are they not found in the accused device?

The Witness: I cannot answer that question, your Honor, unless it is clarified, because I do not want to make a wrong answer.

The Court: Then break it down.

Q. (By Mr. Mockabee): The defendant's device included a part that you identified, called a punch clearer. Is that found on the accused device?

A. The ejector?

Q. The ejector.

Mr. Leonard Lyon: Just a minute. The previous question which was to be clarified was what parts out of Exhibit 5 were found in the defendant's device. Now we have forgotten about [752] 5, apparently.

The Court: Let's withdraw the question. But as far as the ejector, we have already had testimony in which the ejector from the accused device, Ex-

(Testimony of Philip Lipson.)

hibit AZ, has been offered in evidence, is that right?

The Witness: That was the ejector that was used on the accused device prior to a certain other improvement which eliminated its use. I do not use the ejector now. I used to use it.

The Court: I see. All right.

Q. (By Mr. Mockabee): Then, the ejector plate from your equipment that you identified is not, then, on this Exhibit AZ?

A. No, it is not.

Q. For what reason?

A. I have found a better system of ejecting the elements. That is, rather, not ejecting them, but not causing them to stick in the first place. [753]

I have modified the angle and I could only illustrate that by a piece of paper.

Q. (By Mr. Mockabee): I prefer to have you describe it without making too many sketches.

A. I will describe that the punch—I don't know which exhibit it is but it was entered as an exhibit—the Union Slide punch.

Mr. Charles Lyon: Exhibit AS—no, that is the Silberman punch.

Mr. Leonard Lyon: AT.

Mr. Charles Lyon: Or Exhibit D, either one.

The Court: It is the same as Exhibit D for identification. Is this the Union Slide punch Exhibit AT?

The Witness: Yes.

The Court: Go ahead.

The Witness: We find here on Exhibit AT, in

(Testimony of Philip Lipson.)

the front part, a groove, which consists of a semi-circular or radius——

Q. (By Mr. Mockabee): That is sufficient.

A. And two lines which move away from it, which are at a slight angle.

Q. In other words the generally “U”-shaped groove in cross-section has divergent side walls?

A. I wanted to explain first how the old one was.

Q. Proceed.

The Court: Is this the old one or the new one?

The Witness: This is the new one. The old one had a full half-circle and from that half-circle two straight lines moved upward. They weren't very long. They were fifteen-thousandths. But at any rate the channel was not—these were vertical lines.

Q. (By Mr. Mockabee): The legs of the “U” were parallel?

A. Yes, they were parallel, that is right. Now, when this punch—in punching out with this shearing surface it got slightly dull. The scoops formed by that had a burr——

The Court: Now, you are talking about the upper end of the punch—you were talking about the upper end of the punch and now you are talking about the shearing end.

The Witness: Well, the same groove moves all the way down. I merely described here because it is shown.

The Court: On the top end of it?



(Testimony of Philip Lipson.)

The Witness: Yes. But the same grooves go down to the very bottom.

The Court: The shearing end.

The Witness: When these formed burrs on its downward movement—on the downward movement of the punch, after cutting the element, it lodged in here and if it had a burr it didn't come out but it rode up with the punch.

Q. (By Mr. Mockabee): And stuck in the lower portion of the groove?

A. Stuck in the lower portion of the groove. [755] When the punch came down to cut the next groove that one pushed this one up a little bit and stayed in there. And we would often find that these here accumulated here—oh, about, sometimes 10 or 12 of these.

The Court: In the groove?

The Witness: In the groove. And of course they kept on and the tape was pulling upward and continuing through these and it would tear the tape.

Now, in that particular type an ejector was needed so that they could not ride up here. The ejector moved them out.

With the change in these angles we find that the elements eject themselves because they are wider at this part than the inside part.

The Court: You opened up the "U"-shaped groove so that——

The Witness: At an angle.

The Court: So it had a wider opening and therefore they wouldn't stick?

(Testimony of Philip Lipson.)

The Witness: Well, they will not stick.

Mr. Leonard Lyon: Can we fix the date when that was done?

The Witness: Do you want the date?

Q. (By Mr. Mockabee): Can you tell us approximately?

A. It was in May or June of 1949.

May I state also that originally the first ones I tried had a five-degree angle and we later changed it to a 10-degree angle. [756]

Q. (By Mr. Mockabee): Can you describe the tape feed control which is shown on the accused machine, Exhibit AZ?

A. The tape feed control or mechanism?

Q. The mechanism for feeding the tape.

A. This part here. The eccentric——

Q. On the main shaft?

A. It is connected with a connecting rod with the arm that holds the pawl and when the shaft, main shaft turns this connecting rod moves the arm up and down, moving the pawl in an intermittent manner—that is in a motion up and down and each time it moves down it skips over one of these teeth of the ratchet and when it moves up it moves the ratchet forward.

Q. Do you have any particular features regarding the tape feed and tensioning means which you applied to the double-header machine, Exhibit AZ?

A. When I saw this machine for the first time——

The Court: Exhibit AZ?

(Testimony of Philip Lipson.)

The Witness: Yes. The machine that was at the Union Slide Fastener in 1947, this was composed of two parts.

Mr. Leonard Lyon: What is that?

Q. (By Mr. Mockabee): Name the elements.

A. We would call this an eccentric.

The Court: You are talking about the eccentric [757] that leads to the ratchet to pick the tape up?

The Witness: Yes.

The Court: All right.

The Witness: This eccentric was composed of two parts. The upper part was not an eccentric but a cam.

This part here was inside of that outside shell of the cam and was connected with the same kind of a connecting rod.

Q. (By Mr. Mockabee): That is the lower end of the connecting rod?

A. Yes. Well, this is merely hooked on with a bolt there off center and when the shaft turns that moves up and down.

This part, the outer part of the shell of the eccentric at that time was a cam and when it came to a certain point—now, the difference between an eccentric and a cam—I don't know if I have to explain that or not. An eccentric normally takes 180 degrees of the turn of the eccentric to push the activated member forward and it requires 180 degrees to move back.

Cam actions are used wherever a faster action is required.

(Testimony of Philip Lipson.)

Q. Involving a movement of less than 180 degrees?

A. Yes, involving a movement of less than 180 degrees. We have some cams that work in a very fast manner and some cams that work slowly. It depends on the degree, the shortness and the width of the increase. [758]

Q. What was the purpose of the cam?

A. The purpose of the cam was to move the arm of the wire feed mechanism, a pawl arm, that is what it is called, of the wire feed mechanism.

Q. How is your present feed arranged?

A. It is arranged—this is an eccentric instead of a cam so that the action is slower and it isn't as noisy and it does not wear as much as when you get a sudden shock on it. It moves slower and therefore the parts, the bearings do not wear out and the machine is quieter and it is easier to control.

Mr. Leonard Lyon: May I ask when those changes were made?

The Witness: This change was made on the machine in February or March 1950.

Q. (By Mr. Mockabee): Can you recall anything which you have not yet testified to which was developed by you as an improvement of the machines of the Union Slide Fastener Company which were not originally on those machines?

A. There are about 30 or 14. I will point out two major ones.

One is this tension block. There are two jaws.

(Testimony of Philip Lipson.)

Q. The tension block for the tape feed?

A. For the tape. There are two jaws. When the tape is pulled through the die it has to be under a certain tension so that it is rigid. [759]

In order to create this tension and regulate it there are two jaws underneath which clamp the tape and these jaws, one is stationary. The reciprocating part of the jaw is on a spring in the machine that I had found at the Union Slide Fastener Company, Inc., in 1947.

This was done by a mechanism with gears and it cost around, the production of it, for the entire mechanism—I can't tell the figure offhand, but in the neighborhood of \$300 to make. And it always went out of commission when you operated the machine because there was little gears in it which would break or else they would turn them in the wrong direction and you would get more tension instead of less whenever you wanted it.

I devised this means which is simple and which can be adjusted by one screw here to either increase the tension or lessen the tension. And this particular device, the cost of producing it and attaching it, runs somewhere around \$80 or \$90.

Mr. Leonard Lyon: While we are here, can I ask the witness if he can point out any difference between that device and the pertinent parts shown in Figure 7 of the Silberman patent?

The Witness: It isn't shown clearly on here.

Mr. Charles Lyon: We are not making a record.

The Court: The witness has just been shown



(Testimony of Philip Lipson.)

[760] Silberman patent No. '793, sheet 3, Figure 8. He has been asked if there was a similar tension block or device in the Silberman patent.

The Witness: It is only similar in its function but not similar in its construction.

Q. (By Mr. Mockabee): It is, however, a spring-pressed slidable block?

A. Yes; the original that I found on this machine was also spring-pressed. They have to be spring-pressed but the adjustment part of it was very cumbersome and this machine here, it seems to be a device—there is a bolt—whether this is circular or square I don't know because there is no side view of it.

The Court: By "this machine here" you are referring to '793 and Figure 8?

The Witness: Yes. And it seems to be controlled by a plain bolt and counter-nut.

Q. (By Mr. Mockabee): And you have a different type?

A. I have a different system which in my opinion is much easier to adjust.

In this one here you would have to have a socket wrench of one size and a socket wrench of another size to make the adjustment.

The Court: As I understand in this tension block there is no intermittent action on the tape—that is there is no [761] loosening and then tightening. It is a steady tension and the tape is pulled through a gap in the tension block.

(Testimony of Philip Lipson.)

The Witness: Correct, although the movement at the top is intermittent.

The Court: Yes, but there is no intermittent movement at the tension block. It is a matter of the tension block squeezing the tape sufficiently to let it pass through when the intermittent movement above pulls it up.

The Witness: Correct.

The Court: All right.

Q. (By Mr. Mockabee): Is there any other feature which you can briefly point out?

A. Here is another feature which I changed. If I had the Silberman patent here I could point out the change.

(Document handed to the witness.)

The Witness: In the Silberman patent we find——

The Court: Figures 46, 47 and 48.

The Witness: We find a cam in the form generally of a washer with recesses on one part and projections on the other.

Q. (By Mr. Mockabee): Which are generally “V”-shaped in cross-section, is that true?

A. Correct. And in order to release the shoe which presses the tape against a knurled wheel causing its movement around the wheel and upward from the die.

When this tension of the shoe is to be released [762] in the Silberman patent there is this cam action which I described. There is a hole in the center of the washer type cam. The hole is in both

(Testimony of Philip Lipson.)

of them. It is not shown in this one here. It isn't shown here—yes, right here is one. This is the male and this is the female and there is a side view shown here. [763]

The troublesome part of this here was that it was difficult to have it tight. It was always—when it was released, the tension was released, this was always rattling back and forth, and when you wanted to open it up you invariably broke the handles on them. It required that much pressure.

This is, again, what I described before, in describing the metal piece, as a cam action versus eccentric action. I changed that in ours to an eccentric action.

If you will notice, your Honor, I can move this with one finger.

Mr. Leonard Lyon: When did you make that change?

The Witness: I made this change in 1950. I would have to consult my records to be able to describe it.

The Court: What do you call that?

The Witness: Release.

The Court: For the——

The Witness: For the tape feed mechanism tension release.

The Court: Now, again, the tape running between the knurled wheel and the shoe is held under steady pressure and intermittent action elsewhere causes it to slide through the shoe?

The Witness: Yes, your Honor.

(Testimony of Philip Lipson.)

The Court: Now, will you illustrate on Exhibit 5 the two handles at the top here? [764]

The Witness: Yes, your Honor. This here release is a cam action, in that it isn't circular, it is more of a cam action.

I haven't analyzed Exhibit 5 of the plaintiff's machine enough to be able to tell why it has this circular part and why it has this part here, and I couldn't tell. Perhaps the plaintiff could tell more. I would have to operate the machine to be able to tell that.

The Court: Is this release that you see on Exhibit 5, release for the tape feed mechanism that you see on Exhibit 5, similar to what was on the Loew machine when you first started to work with it?

The Witness: No, your Honor.

The Court: The one that was on the Loew machine was more nearly like what is shown in Silberman?

The Witness: Yes, your Honor. This is both cam and eccentric action, it seems to me. But I can't tell without examining it closely.

Mr. Mockabee: Do you have any questions about the machine, Mr. Lyon?

Mr. Leonard Lyon: I haven't any questions now. I may never have any.

Mr. Mockabee: I thought if you did, we were here——

The Court: Are you through, then, now for the time being? [765]

(Testimony of Philip Lipson.)

Mr. Mockabee: I just wanted to ask the witness a couple of questions about the top stop machine which he has here in the courtroom.

The Court: What would the next exhibit number be, Mr. Clerk?

The Clerk: BA.

Mr. Mockabee: I offer it in evidence.

The Court: BA received in evidence. May we have the stipulation that BA may be withdrawn by the defendant to be produced when required by the court?

Mr. Leonard Lyon: I so stipulate.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BA.)

Q. (By Mr. Mockabee): In general, Mr. Lipson, this machine is intended to form from a piece of wire a top stop and apply it to a zipper tape, is that not true? A. That is true.

Q. Who designed that machine? A. I did.

Q. Who conceived the elements making up the combination of the machine?

Mr. Leonard Lyon: I would like to lay a foundation for the date when this machine was designed.

The Court: We will get to that. Answer the question. Who conceived the idea of the machine?

The Witness: The idea of the machine or the elements?

Q. (By Mr. Mockabee): The idea of the machine. A. I did.

The Court: What date?



(Testimony of Philip Lipson.)

The Witness: I conceived the idea around the end of 1948.

Q. (By Mr. Mockabee): Is that machine in use in your plant?

A. This particular machine has just been finished and is on test.

Q. Are machines of that type in use in your plant? A. Yes.

The Court: This is an improvement over some earlier machine that you built?

The Witness: Yes, your Honor.

The Court: Have you applied for a patent on the earlier machine?

The Witness: Yes, your Honor.

The Court: Did you get a patent on the earlier machine?

Mr. Mockabee: The present status of the application, your Honor, is that a number of claims have been allowed and it has just about reached its final stage of prosecution.

The Court: No patent as yet has been issued——

The Witness: No.

The Court: ——on Exhibit BA or any of its predecessors? [767]

The Witness: No, your Honor.

Q. (By Mr. Mockabee): But such machines are being used in your regular production, is that not true? A. That is correct.

Q. In attempting to negotiate a settlement of your controversy with plaintiff, was this machine

(Testimony of Philip Lipson.)

offered as a part of your contribution to the negotiation for settlement?

Mr. Leonard Lyon: I object to that on the ground it is privileged.

The Court: Sustained. It has no bearing in the trial of this action. It is a matter of your negotiations.

Mr. Mockabee: There has been some discussion on that.

The Court: Any discussion that you have had on that would have been off the record.

Mr. Mockabee: That will be all about the machine. I think we can return to the courtroom, your Honor.

The Court: We will take a little recess.

(Recess taken.)

The Court: How long do you estimate you will be, Mr. Mockabee?

Mr. Mockabee: I certainly hope to finish up with Mr. Lipson tomorrow.

The Court: Do you expect to take all day tomorrow?

Mr. Mockabee: I hope not sir. There are two other rather important matters to be brought up by his testimony. [768] I will get through as soon as possible.

The Court: I will have to take a recess right at 4:00 o'clock. I probably will not be more than 10 minutes. We can get another 20 minutes in after that. So let's go ahead.

Q. (By Mr. Mockabee): Mr. Lipson, from your

(Testimony of Philip Lipson.)

inspection of plaintiff's Exhibit 5 and defendant's Exhibit AZ, and comparing those two machines with the machines which you originally saw in the Union Slide Fastener factory when you associated with Mr. Loew, is it not true that the improvements which you state you devised and incorporated in Exhibit AZ, and that type of machine, and are also found on Exhibit 5, were of considerable importance in the increase of the speed of operation of the machine? A. Yes.

Q. Referring back to the Poux patent '017 in suit, I ask you to observe the mechanical elements which are illustrated in that patent as a means of carrying out the method disclosed by Poux. In the Poux drawing is there shown means for feeding a tape into a predetermined position? A. Yes.

Q. Does that comprise rollers 12 and 13?

A. Yes.

Q. Is there shown in Poux means for feeding a metallic member towards that predetermined position? A. Yes. [769]

The Court: What patent are you comparing it with now, indirectly?

Mr. Mockabee: Silberman's '793.

The Court: All right.

Q. (By Mr. Mockabee): That is the feed rolls 9?

A. One is indicated as 9, on Fig. 2. The other one I don't know if the 8 refers to——

Q. They are identical rollers, aren't they?

A. Yes, they are identical rollers.

Q. Is the apparatus shown in Poux one which

(Testimony of Philip Lipson.)

includes means immediately at the predetermined position of the tape for performing all operations on the fed member to form slide fastener elements from the fed member and to attach the elements to the tape directly from the fed member?

A. What is considered under the term "immediately at"? [770]

Q. Closely adjacent to that position?

A. The answer is yes.

Q. Is it not true that in the drawing, Fig. 2 of Poux, the scale is greatly enlarged with respect to the size of an actual zipper element and the tools necessary for forming it?

A. In my opinion, yes, although depending on the size of the zipper to be made.

Q. Well, I am speaking of conventional zippers such, for instance, as are made—well, the No. 3 zipper for instance, the skirt zipper.

A. Well, for a No. 3 zipper this would be enlarged.

Q. Considerably, is that not true?

A. Considerably.

Q. So that in an actual organization the punches on the head 14 would occupy a rather small space, is that not true?      A. Yes.

Q. Close to the tape?

A. Close to the place where the tape is engaged.

Q. Is there a base shown in the Poux patent? is shown.

A. A cutaway of some type of a base or plate

(Testimony of Philip Lipson.)

Q. Are bases usually provided for zipper machines?

A. Yes, bases on which you mount the die assembly.

Q. Was that done prior to 1931 to your knowledge?

Mr. Leonard Lyon: The witness was in Germany then, I think, or some other place. Counsel hasn't laid any foundation [771] for the witness knowing anything about zipper machines at that date.

The Court: He wasn't in Germany but he was in a commercial line of business. The objection is sustained.

Q. (By Mr. Mockabee): Were you familiar with die punching machines prior to 1931?

A. Yes, sir.

Q. Did they contain bases upon which the moving elements of the machine were mounted?

A. Yes.

Q. Did they contain shafts for operating the mechanism in the machine? A. Yes.

Q. Carried by the base or supported by it?

A. Yes, supported by it.

Q. Directly or indirectly?

A. They were carried above—those that I have seen were carried above the base.

The Court: There is no issue in this case about crankshafts or bases or rams or punch blocks.

Those are old in the art. All of them. If there is



(Testimony of Philip Lipson.)

any invention here it doesn't vest in those things or any combination of them, I don't believe.

Mr. Mockabee: I just wanted to be sure.

Mr. Leonard Lyon: You have stated my position correctly. [772]

The Court: It is 4:00 o'clock and I will be back in 10 minutes. We will take a short recess.

(Short recess.) [773]

The Court: Proceed.

Q. (By Mr. Mockabee): Referring to the patent to Poux '017, in your opinion could a zipper of the type generally being manufactured and sold today be made from a round or square rod?

A. Not the commercial type use of the zipper as it is known today.

Q. For what reason?

A. In a commercial zipper, and I have before me here two zippers made by Talon, a No. 3, which is used widely in the garment industry, and a No. 5, which is used for luggage or for heavier garments, heavy garments, and in this zipper we find——

The Court: Which is "this"?

The Witness: This is the Talon zipper.

The Court: No. 5?

The Witness: No. 5, yes. And this is a Talon zipper No. 3. (Indicating.)

The Court: Let's mark these. No. 3 will be Exhibit BB. Is there any objection to receiving it in evidence?

Received in evidence as Exhibit BB.

(Testimony of Philip Lipson.)

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BB.)

The Court: And No. 5 zipper will be BC in evidence. [774]

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BC.)

The Witness: I will now measure the dimension of this zipper.

The Court: Which one?

The Witness: The Talon No. 5, in its width, the width of the element.

Mr. Leonard Lyon: I assume the witness has done this before, and he can tell us the results without measuring them here in the courtroom.

The Witness: Yes, I have.

The Court: All right. What is the width of it?

The Witness: The width of this element runs generally between 99 thousandths of an inch and 102 thousandths of an inch. That is .099 to .102. Whereas the height of the element, the thickness of it, without the projection, measures in the Talon zipper that I have before me approximately 37 to 38 thousands.

Now, if a square or a round rod was used to make zippers, the thickness of the element would have to be the same as the width of the element. It would therefore be from 99 to 101 thousandths thick instead of its present thickness.

Q. (By Mr. Mockabee): From your figures,

(Testimony of Philip Lipson.)

then, the commercial zipper is approximately three times as wide as it is high, is that correct? [775]

A. Not quite three times.

Q. But roughly? A. About  $2\frac{1}{2}$  times.

Q. All right. Proceed.

A. Such a zipper would be very, I would say, clumsy, and would have no marketable value on garments. In my opinion, when I have seen zippers manufactured by the plaintiff for use in heavy duty, such as tarpaulins that the Army uses, some of those are die cast zippers, even in those zippers, like a No. 7 or a No. 9, the thickness of the metal does not reach 99 to 102 thousandths, and those are zippers that could hardly be used on garments.

In the No. 3 zipper made by the plaintiff we find that the width generally runs approximately 78, 79 thousandths, made of a square rod, or a round rod, in the Poux method. The thickness of this element, which is now about 36, 37 thousandths, would also have to be the same as the width, 78 or 79 thousandths. How such a zipper could be put on a garment, that has never been tried or never been marketed, how it could be marketed—I don't think it could be. And I have never seen or heard of zippers, No. 3 or No. 5, having those dimensions.

Q. Have you ever seen a plastic zipper wherein the interlocking elements are made of plastic?

A. Yes. I have one here before me. [776]

The Court: Are you going to have some testimony about this plastic zipper?

Mr. Mockabee: Yes. It will be very brief.

(Testimony of Philip Lipson.)

The Court: All right. It will be Exhibit BD in evidence. Go ahead.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BD.)

Q. (By Mr. Mockabee): Could a plastic zipper, such as Exhibit BD, be made according to the Poux method? A. No.

Q. For what reason?

A. A plastic material, as it is known today, and as I have seen on zippers made by plaintiff, as well as other zippers, the plastic cannot be punched in such a way as to form recesses and projections, unless it is in its soft stage. Now, if it was in its soft stage, how could it be propelled forward by these rollers? It would bend. You couldn't control it. [777]

Mr. Leonard Lyon: If your Honor please, may I inquire—I don't think the question is definite. Is the witness answering it could not be made by the method in the Poux patent or the apparatus shown in the Poux patent?

The Witness: Is that a question?

Mr. Leonard Lyon: If you would answer it.

The Witness: The Poux method shows that it is a rod or square propelled——

Q. (By Mr. Mockabee): Mr. Lipson, let me interrupt. A. Yes.

Q. If you can make your comparison here without regard to the mention of apparatus please do so. That is the manner in which it is formed and not the article which does the forming.

(Testimony of Philip Lipson.)

A. The manner in which it is performed, you have to punch the recesses and projections. You have to punch the holes and you have to clamp the jaws over a tape.

In my estimation it cannot be done by the Poux method.

Q. How are plastic zippers made?

A. To the best of my knowledge they are molded.

Q. When did you first meet David Silberman, the patentee of patent '793 in suit?

A. About the middle of August 1948.

Q. What was the occasion of that meeting?

A. Mr. Silberman telephoned our factory. [778] I did not speak to him. He asked for——

Q. Did you meet him at that time?

A. No, he telephoned first. He phoned the day before a meeting that was held in the Hollywood-Roosevelt Hotel.

Q. And then you met him at that meeting the next day?

A. I met him at the meeting the next day.

Q. What was the reason for the meeting?

A. What happened when we came to the meeting? He didn't phone me and I could only state what I was told by Mr. Loew, why he wanted to see us.

Q. What occurred at the meeting?

A. At the meeting? I came there with Mr. Loew, who was then president of the Union Slide Fastener Corporation.



(Testimony of Philip Lipson.)

We were told when we rang his room number——

Mr. Leonard Lyon: If your Honor please, I don't want to interfere but I don't want to consent to any hearsay.

There has been no representative of the plaintiff established as being present at this meeting or taking part in this conversation.

The Court: You hold the Silberman patent by assignment from Silberman?

Mr. Leonard Lyon: Yes.

The Court: Doesn't the law that pertains, for instance, to real estate, where declarations of predecessors in interest bind a successor in interest? Isn't the law the same as to patents? [779]

Mr. Leonard Lyon: There is a recording statute involved and I don't know what is coming out. But there is a recording statute in connection with patents and the question of whether plaintiff took it with any notice I don't know. I don't know what the conversation is going to be but if there was any agreement, why, they would have to be on some notice to the plaintiff.

Mr. Mockabee: With regard to the recording statute, I believe that the recordings generally are regarding assignments of patent rights and that licenses generally are not recorded.

The Court: Well, I don't know what is coming out either, but supposing Silberman who allegedly invented patent '793, before he assigned the patent to Talon, said to A, B, and C: "I never invented

(Testimony of Philip Lipson.)

this patent. Joe Doakes invented it. I stole it from him. I made the application."

Certainly that is an admission against interest as to Silberman. Now, can that kind of an admission be used against a successor in interest of Silberman who now claims to own the patent?

Mr. Leonard Lyon: I didn't have in mind anything of that kind. I thought maybe the witness was going to testify to some agreement.

The Court: I am not even speculating that that might come out, but I am trying to explore this question as to [780] whether or not you, as the successor in interest to Silberman——

Mr. Leonard Lyon: Oh, I think if Silberman ever admitted he wasn't the inventor probably the admission would be receivable in evidence.

The Court: Well, I don't know what is coming out either. Let us take a second alternative.

Supposing Silberman at this meeting said: "Look, you have got a machine there that infringes my machine but it is all right with me for you to go ahead and make some improvements on it and I will never charge you with infringement."

And thereafter the Union Slide Company, relying on Silberman's statement made improvements on the machine, spent money on it, relied upon Silberman's statement. And thereafter Talon takes the patent by assignment. Can't that estoppel be shown?

Mr. Leonard Lyon: With a warranty from Silberman which is in the assignment that there were

(Testimony of Philip Lipson.)

no licenses issued under the patent and the license was not in writing and not recorded and Talon had no notice of it, of the transaction or knowledge of it at the time they bought the Silberman patent. I think it would be cut off.

The Court: Do you contend that the purchaser of a patent by assignment is exempted from the general rule of caveat emptor, and by being a bona fide purchaser he in some way gets a better title than the title that his assignor had? [781]

Mr. Leonard Lyon: I think I would prefer to read your Honor the statute.

The Court: What section is it? You had better look up a little law over the night and bring it up again in the morning.

Mr. Leonard Lyon: I think it is Section 261 of the statute, your Honor.

The Court: The last paragraph may be the answer:

“An assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a value consideration without notice unless it is recorded in the Patent Office within three months from its date or prior to the date of such subsequent purchase or mortgage.”

I will have to study that.

Mr. Mockabee: I think, however, your Honor, there is a considerable difference between an assignment of title to a patent and the granting of a license; that the granting of a license does not come within the purview of that statute.

(Testimony of Philip Lipson.)

The Court: It mentions assignment, grant and conveyance and doesn't mention a license. I will check some law on it and convene at 9:30 tomorrow morning.

(Whereupon, at 4:30 o'clock p.m. a recess was taken until 9:30 o'clock a.m. of the following day, Thursday, March 10, 1955.) [782]

March 10, 1955, 9:30 O'Clock A.M.

The Court: Call the case.

The Clerk: No. 10450-C Civil, Talon, Inc., vs. Union Slide Fastener, Inc., further trial.

The Court: In the transcript of Tuesday, March 8, I just happened to turn to this page 519—I haven't been reading this transcript—and the reporter has the court making an unintelligible statement, which is to be expected from time to time, but I think that the matter was misunderstood by the reporter. Line 7. We were talking about the answers to interrogatory 83. The statement is: "That is the interrogatory that the answer is here. It was submitted separately."

It should read: "That is the interrogatory." Strike out "that." Put a capital "T" on "the." So it will read: "That is the interrogatory. The answer is here. It was submitted separately."

If that is the worst that happens, I won't be too badly concerned.

Mr. Leonard Lyon: In connection with the matter that was under discussion at the adjournment last night, I wonder if I might ask your Honor

(Testimony of Philip Lipson.)

if you have read the deposition of Mr. Loew. You have told us you read the deposition of Mr. Silberman, but the deposition of Mr. Loew is quite pertinent to what is the subject of the examination now.

The Court: I haven't read it.

Mr. Leonard Lyon: I think your Honor will find that it will help you in ruling on the testimony as we go along of Mr. Lipson at this point if you know what Mr. Loew said. The defendant has offered Mr. Loew's deposition in evidence, and Mr. Loew was present at the conversation.

The Court: And he testifies to the same conversation?

Mr. Leonard Lyon: He testifies that there was no agreement of any kind.

The Court: Regardless of what he testified to, we are coming now to a meeting at which Lipson, Loew, and apparently Silberman were present.

Mr. Leonard Lyon: That is correct.

The Court: Now, the defendant, or the plaintiff offered Loew's deposition?

Mr. Leonard Lyon: The defendant offered Loew's deposition.

The Court: And it went in without objection?

Mr. Leonard Lyon: Yes.

The Court: Whereby Loew testified to this particular conversation?

Mr. Leonard Lyon: Yes.

The Court: Whatever it was?

Mr. Leonard Lyon: Yes.

The Court: Now, Lipson is going to be asked



(Testimony of Philip Lipson.)

about that [786] conversation, but you are going to object to his relating the conversation, although you didn't object to Loew relating it in the deposition?

Mr. Leonard Lyon: Except such objections that were in the deposition, and I don't believe there were any adequate objections.

I think I should be allowed to make an objection on the same grounds to Loew's testimony; in other words, this is not an objection to the form of the question, it is an objection that could be made at the trial, to the competency and relevancy of the testimony. [787]

The Court: The fact that Loew would say there was no agreement and that Lipson might say there was, doesn't answer the legal question.

The legal question that I asked you to check into last night is whether or not there is any rule of law in the field of patents similar to the law in the field of real estate, and I am only reasoning by analogy, that the predecessor in interest having made some statement about his title or having done something in connection with it, that testimony is apparently admissible subsequently on some question concerning the property involved.

Mr. Leonard Lyon: Your Honor not having read Mr. Loew's deposition and not having heard the testimony, may have something in mind that isn't involved.

This isn't a question of any statement as to title or whether he was an inventor. This was a

(Testimony of Philip Lipson.)

statement as to whether or not there was any statement by Mr. Silberman that he would not sue the plaintiff—the defendant, as long as the defendant made an agreement with respect to European sales.

If there was such a statement or if there was such an agreement, which Mr. Loew says there was not at the conversation, and Mr. Loew was present, the question would be is it a conveyance under the patent. If it is a conveyance under the patent then it would be subject to the recording statute that I read to you last night. [788]

If it was not a conveyance under the patent then it would be a personal covenant that would run with the patent and would be terminated when the plaintiff acquired the patent.

Obviously the plaintiff could not have enforced that agreement and also the agreement would be subject to the statute of frauds.

If it is not a conveyance under the patent then it is a matter of California law. It is not a matter of patent law at all.

The Court: Well, you think you know what Lipson is going testify to. I don't.

Can you make a brief statement, Mr. Mockabee, as to what you expect to prove arising out of this conversation at the Hollywood-Roosevelt Hotel?

Mr. Mockabee: I expect to prove in the main two points. One is that Silberman made a statement to the effect that Loew and Lipson were infringing his patent and as a result of that statement he stated that patents in the zipper art were

(Testimony of Philip Lipson.)

not very strong. That was the implication of his statement. And that his patent would not stand up in court; that he was interested in foreign market, particularly Europe, and that if Loew and Lipson or Union Slide Fastener refrained from sales in Europe he would not sue for infringement in the United States.

Now, the statements made by Mr. Lipson regarding what [789] Loew said and what he did not say I think can properly be interpreted by the court from the Loew deposition.

Mr. Leonard Lyon: Now, if the court please——

The Court: Wait just a minute.

Mr. Leonard Lyon: Excuse me.

The Court: You said two things. So far I have got one down here. What is the other?

Mr. Mockabee: One was, first, that the Silberman patent would not stand up in court.

The Court: And the other is about the European sales.

Mr. Mockabee: The other one was if they stayed out of the European market he would not prosecute them for infringement in the United States.

Mr. Leonard Lyon: Now, may I reply to those two points separately?

The first statement would not be an admission of fact which would be binding on the plaintiff, whether the patent is valid or not, and particularly whether the patent would stand up in court is a question of law and not an admission of fact which would be receivable in evidence. And cer-

(Testimony of Philip Lipson.)

tainly not binding on the plaintiff who bought the patent and would have a right to produce the facts before the court and let the court decide the matter.

The Court: On your first point I agree with you. His conclusion as to whether the patent would stand up in court [790] is a conclusion on the ultimate question the court will have to decide. He couldn't come into court and say—no witness could come into court and say there is no invention—the patent is good or the patent is bad. That is the question the court has to decide and it is not a statement of any fact. It is not a statement of something that happened or that he did that would create a defect in his title. I am inclined to agree with you as to the first point.

The second one I think is——

Mr. Leonard Lyon: Is entirely a personal covenant. The plaintiff could not have sued on that covenant and in addition to that no time was stated as to when there would be a revocation and particularly if Mr. Silberman parted with his patent. And any such covenant would not be binding on the plaintiff under the statute of frauds of this state.

The Court: I should have heard from you on the first point. Do you want to talk as to the first point?

Mr. Mockabee: As regarding his opinion of his patent, I think it is an admission of the owner of the patent as to the value he places on it and its importance as a patent and properly should be considered.



(Testimony of Philip Lipson.)

The Court: What is your answer to the second point?

Mr. Mockabee: With regard to the transfer, the loss of any license upon transfer?

The Court: No, with regard to the admissibility of a [791] statement by Silberman that he was interested in European sales and if Loew and Lipson or Union Slide would refrain from European sales he would not sue for infringement.

Mr. Mockabee: I think it creates a license. It was an offer that was acted upon and carried out by the defendant.

Licenses do not have to be in writing and I think the offer which was acted upon by the defendant creates an estoppel on the part of Silberman or his successor in interest to deny the existence of a license.

And insofar as the termination of the license upon sale of the patent to Talon is concerned, the purchaser takes a license with the title which the seller can pass and subject to any encumbrances on it. [792]

The Court: Just a minute.

Now you have raised the element of estoppel, which was mentioned last night.

Mr. Lyon.

Mr. Leonard Lyon: I think the estoppel would be a personal estoppel, and would not run with the patent, if there was such an agreement. Mr. Loew says there was not. But if there was, it was a statement—on counsel's statement—that Mr. Sil-



(Testimony of Philip Lipson.)

berman would not sue. That is a personal covenant; that is not a license. He didn't say he would give him a license; he said he wouldn't sue them as long as they did something. That is a personal covenant, and I don't believe it would run with the patent at all on a sale to a subsequent party who had no knowledge of the agreement and didn't assume the agreement, if there was one.

The Court: Well, we knew last night this problem was coming up. I assume we have no authority on it except those eminent authorities of Lyon and Mockabee on Patents.

Mr. Leonard Lyon: That is right. Except we have Mr. McCoy. He had a case once that he got defeated on, but it isn't reported.

Mr. Mockabee: I didn't have time to run down any cases. I have Walker on Patents that touches on several of these points.

The Court: Do you think Walker on patents might be more [793] persuasive than Lyon and Mockabee on Patents?

Mr. Mockabee: I think it is more generally recognized, yes.

The Court: What does Walker say?

Mr. Mockabee: With regard to oral licenses, licenses may be written——

The Court: What section and page?

Mr. Mockabee: Section 380, page 1490, Walker on Patents.

The Court: Which edition?

Mr. Mockabee: Deller's Edition.

(Testimony of Philip Lipson.)

The Court: All right.

Mr. Mockabee: "Licenses may be written or they may be oral."

There are half a dozen citations; do you want me to read them?

The Court: That doesn't answer our problem.

Mr. Mockabee: Section 381, page 1491: "No license is required to be recorded."

Mr. Leonard Lyon: Will you read the paragraph there on the same page that refers to the statute of frauds?

Mr. Mockabee: That is on page 1490.

Mr. Leonard Lyon: Yes.

Mr. Mockabee: It says, "The former, the written licenses, have advantages over the latter, because they can be made exclusive and can usually be proved with more ease and [794] more certainty, and because the latter may sometimes be obnoxious to some state statute of frauds and be rendered non-enforceable by being non-performable within one year of the dates of their origins."

Regarding that particular point, your Honor, I don't think that you ordinarily reduce an estoppel to writing and record it. Regarding——

The Court: Now, wait just a minute. I have a sort of lurking in the back of my head that under our California law on the statute of frauds, situations of estoppel take the matter out of the statute of frauds. I couldn't cite a case, but I sort of have the feeling that that is sort of an exception or variation of that rule.

(Testimony of Philip Lipson.)

Mr. Leonard Lyon: As I understand the law, and it is a very difficult subject, I went through it before Judge Mathes on an oral agreement in connection with a patent, and it was afterwards passed on by the Circuit Court of Appeals, if there was some performance that is related directly to the agreement, then that may take the case out of the statute. But you can't just circumvent the statute entirely by just saying, well, we talk about estoppel.

The Court: There have to be facts from which an estoppel would rise.

Mr. Leonard Lyon: Yes. But the making of an agreement, whether there was an agreement and whether that is within the [795] statute of frauds, can't be circumvented by just saying, "We will pay no attention to the agreement, we will call it an estoppel."

My point is that I have made my objections for the record, and I agree that it would be best if your Honor took the testimony subject to the objections, and for later rulings when you decide the case.

The Court: The thought that was going through my mind was that there is no jury here, and in order to progress with the case, and since we are not now ready with any further authorities, it would probably be better to take the testimony, overruling your objections and reserving to you a motion to strike, and you can raise the question later on.

(Testimony of Philip Lipson.)

Mr. Mockabee, you had some other observation to make here and I interrupted you.

Mr. Mockabee: It is along these lines. Do you want me to refer to them? Such as Section 390, Walker, page 1503: "A license not expressly limited in duration continues until the patent expires."

And Section 373, page 1468: "Purely implied licenses may arise from the conduct of patentees and grantees of patents or from recoveries by them of profits or damages for certain classes of infringements."

They are the only ones that I have at hand at the moment, your Honor. [796]

The Court: Another matter that we should look into as we go along is the meaning of the last paragraph, paragraph 4, Section 261, U.S.C., Title 35. Leaving out the question of estoppel, that would seem on its face to answer the question as to assignments, grants, or conveyances, which are said to be void as against a subsequent purchaser for value, without notice.

There is evidence here of the purchase for value. I would have to think as to whether or not there is any direct evidence about the problem, "without notice," of this purported agreement between Silberman and Union Slide.

Probably that would have to come in by rebuttal.

Maybe at this stage of the case it would be proper to take the evidence, and then, in orderly fashion, the rebuttal evidence, if there was any, as

(Testimony of Philip Lipson.)

to lack of notice of this would come in. But I am getting off my real point. My real point is I take it that words like assignment, grant or conveyance are words of art in the patent field, so the question arises whether the word "license" was intentionally omitted from "assignment, grant or conveyance," or whether it is some sort of a different legal animal and is not affected by those words, whether it is included or not included.

An assignment would seem to amount to all of the right or an undivided interest in a right.

Mr. Leonard Lyon: That is correct. [797]

The Court: Likewise, a grant might be the same.

Mr. Leonard Lyon: Yes.

The Court: Or conveyance. A license is an entirely different proposition. A man keeps all his right when he issues the license, he keeps his title, but he permits someone else to make use of the property to which he has a title. So it seems to me to properly analyze this problem, in addition to going into this question of estoppel and the statute of frauds, if the evidence so develops, we would have to also check the law as to whether the word "license" was intentionally left out of that section, or whether it is included within the words, "assignment, grant or conveyance."

Mr. Leonard Lyon: I understand that. But even ahead of that on that same subject would be the question of whether the evidence shows that Mr. Silberman made a personal covenant that he would not sue, or whether he granted a license that



(Testimony of Philip Lipson.)

would be good against anybody that owned the patent.

The Court: That in a way is a question of fact.

Mr. Leonard Lyon: Yes.

The Court: In a way it is a question of fact that you couldn't determine until we heard this. All right.

Mr. Mockabee: May I make just one short statement regarding recording?

The Court: Yes.

Mr. Mockabee: In the same Section 381 from which I read [798] an excerpt: "And no record of a license affects the rights of any person, for a license is good against the world, and a purchaser of a patent takes it subject to all outstanding licenses."

Your Honor, I think we can very easily show that the statute with regard to recording in the Patent Office does not include licenses. The Patent Office will record a license, but the fact of recording has no effect upon it.

The Court: All right.

Did Section 261 purport to change the law, or was it merely a re-codification?

Mr. Mockabee: That has been the law for years.

Mr. Leonard Lyon: The law in this is in this Journal of the Patent Office Society, which sets forth the Act, it also sets forth the old Act, and the reviser's notes say that Section 261, which is the new section in question, was based on Title 35, U.S. Code 1946, revised Statutes 4898, amended

(Testimony of Philip Lipson.)

March 3, 1897, February 18, 1922, August 18, 1941.  
And then this observation:

“The first paragraph is new but is declaratory only. The second paragraph is the same as in the corresponding section of existing statute. The third paragraph is from the existing statute, a specific reference to another statute is omitted. The fourth paragraph is the same as the existing statute [799] but language has been changed.”

The Court: It is the fourth paragraph that we are particularly interested in.

Mr. Leonard Lyon: It is the same as the existing statute but the language has been changed.

The language before said, “An assignment, grant or conveyance shall be void as against any subsequent purchasers or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof or prior to such subsequent purchase or mortgage.”

I see nothing very material in the change.

The Court: No difference except the use of words.

All right. Have you made all the types of objections that you want to this proposed testimony?

Mr. Leonard Lyon: Yes. And if the testimony can be taken subject to the objections, it will be satisfactory.

The Court: The objections are overruled, and may it be understood that the objections go to the entire line of questioning, without Mr. Lyon having

to restate his objections or to make an objection to each particular question?

Mr. Mockabee: Yes.

The Court: The objection will go to the entire line of questioning concerning this conversation.

Mr. Mockabee: Yes. [800]

The Court: All right.

Mr. Mockabee: Take the stand, Mr. Lipson.

The Court: There will be reserved to the plaintiff a motion to strike, which I trust they will make only after we further research the law. [801]

### PHILIP LIPSON

a witness called by the defendant, having been previously sworn, resumed the stand and testified further as follows:

#### Direct Examination—(Continued)

The Court: You may proceed.

Q. (By Mr. Mockabee): Yesterday we had arrived at the point where you and Mr. Loew had met with Mr. Silberman at the Hollywood Hotel in, I believe, August of 1948. Is that correct?

A. Yes. It was the Hollywood-Roosevelt Hotel.

Q. Hollywood-Roosevelt. Did you know Mr. Silberman before that time?

A. No, I had never met the gentleman before.

Q. What occurred at the meeting with Mr. Silberman?

Mr. Leonard Lyon: I object to that, your Honor, on the additional ground that parties present haven't been identified.

(Testimony of Philip Lipson.)

The Court: Well, let us lay a foundation. Who were present?

The Witness: Mr. Silberman, Loew and myself.

Q. (By Mr. Mockabee): No one else was present?

A. Not at the beginning. It was not in Silberman's room. It was in the coffee shop where Mr. Silberman had breakfast and we sat at the table and there were some other people that later on, toward the end of the conversation that occurred, one or two of them came over and said, "hello" but there was no one present beside the three mentioned during [802] the course of the entire meeting.

Mr. Leonard Lyon: Has the date been fixed?

Mr. Mockabee: The date stated was August, 1948.

The Court: Do you know the exact date?

The Witness: I don't recall, your Honor. I believe it was the 10th and 15th of August.

The Court: All right, go ahead.

Q. (By Mr. Mockabee): Would you repeat the question?

The Court: Before you go into that, in giving a conversation tell what each party said. Don't give your conclusions. In other words a layman might say: "Well, we met and agreed to do so and so." That is your conclusion. You tell us what you said, what Silberman said and what Loew said and we will draw our own conclusions as to what happened.

The Witness: All right, your Honor.

(Testimony of Philip Lipson.)

The Court: What was said at this meeting?

The Witness: Mr. Silberman was angry and accused me of making certain statements——

The Court: What statements?

The Witness: In London, England when I demonstrated my machine.

Q. (By Mr. Mockabee): Louder, please.

A. When I demonstrated our machine in London, England representatives of Lightning Fastener, which is a branch of the Imperial Chemical Industries, visited the place where I [803] demonstrated the machine.

They made certain statements to the effect——

Mr. Leonard Lyon: I don't understand who made these statements.

The Court: Is this what Silberman said? What did Silberman say to you?

The Witness: He stated to me that I had made statements to the representatives of the Lightning Fastener in London that were not complimentary to Silberman and his invention.

The Court: All right.

The Witness: And I asked Mr. Silberman—I told Mr. Silberman that I had never met him and since the patent wasn't published until after I left for England I had no knowledge of his patent; that when these people asked me about a machine which they said was very similar to the one that we had and they had a lot of trouble in making it work efficiently, especially on square shoulder elements, and they said they were interested to see



(Testimony of Philip Lipson.)

how we managed with the square shoulder element and they asked us how does it come that Mr. Silberman——

The Court: Now——

The Witness: This is my answer to Mr. Silberman.

The Court: All right.

The Witness: I related that to him. They asked me how did it come that in our machine in some manner resembles that one which Mr. Silberman had a patent on, so I stated—I [804] related that to Silberman, that I stated to them that in my opinion there is art in this machine which is public knowledge and that it is not patentable and that if Mr. Silberman did patent it it was in error and that perhaps in reading over the patent we would see that there is a little bit taken from one invention or from many inventions and combined together.

Now, I stated that to Mr. Silberman, that that was the extent of my explanation to the representatives of Lightning and he calmed down, Mr. Silberman did, and he wasn't sore any more.

Mr. Leonard Lyon: That is a conclusion.

The Court: It is the kind of conclusion a witness can testify to. Objection overruled.

The Witness: And whereupon Mr. Silberman stated to both of us, to Mr. Loew and myself: "I sold my patent to the I.C.I. for \$650,000. I received \$150,000 upon delivery of certain machines to them and I have a guaranteed royalty of \$100,-

(Testimony of Philip Lipson.)

000 each year. When you guys go to England," and I am using Mr. Silberman's words, "and sell your machine for peanuts how will I be able to collect that money I have got coming unless I sue you. I am not going to be that foolish to sue you under my patent because you know and I know that this patent will not hold water in court. I will sue you, Mr. Loew, for conspiracy to bribe one of my employees to disclose to you matter which he was not supposed to disclose." [805]

When Mr. Silberman stated that I told him that I don't know anything about the matter of bribing or hiring as I was not a member of the firm and to my knowledge if this was done it was done before there was ever a Union Slide Fastener Corporation, whereupon Mr. Silberman stated as follows—I beg your pardon, your Honor. Mr. Loew then stated to Silberman: "You have a patent on a round shoulder element. You have adopted knowledge that you had from my patent which I disclosed to you before it was published. You have adopted that for your machine in making a square shoulder element."

I cannot relate the whole thing. They started arguing, Mr. Loew and Mr. Silberman, as to who stole from whom, but the conclusion of the thing was that——

Mr. Leonard Lyon: Now, I object to the conclusion, your Honor.

The Witness: I mean the conclusion of the meeting, not my conclusion.

(Testimony of Philip Lipson.)

The Court: Strike out the word conclusion. What happened next?

The Witness: Next Mr. Silberman stated this: "I have no objection to you boys manufacturing and using your machine or selling your machine anywhere else in the world. Go to South America. Go to Australia. Go to Mexico—operate in the United States, but do not sell any machines in England and Europe because that is where my rights to the patent are [806] asserted. I will never sue you if you do that—not under any conspiracy or the patent."

Whereupon, I stated to Mr. Silberman, I said, "Mr. Silberman, your proposition is good. I would be inclined to accept it and I believe we will accept it. There is only one thing you can help us. Your clients in London—Lightning Fastener, stated that they have difficulty in operating their machines on square shoulder elements. We have solved that problem."

During my absence in Europe where I had in demonstrating the machine—where I had an enthusiastic audience I made a lot of prospects who wanted to buy machines. During my absence in Europe Mr. Loew, on hearing of the wonderful enthusiasm didn't wait until we had bona fide orders or until the restrictions were taken off in shipping machines into Europe, but he immediately ordered the parts and started production on 10 zipper chain machines.

And now I said: "Mr. Silberman, we have no

(Testimony of Philip Lipson.)

prospects elsewhere in the world and we have tied up at least \$25,000 in these 10 machines. It would be an awful hardship for us. Couldn't you help us dispose of these machines to perhaps your client the I.C.I. Maybe they would buy five or all the 10 machines. It would help," and Mr. Silberman said, "I will try to help you out." And he said that he was going to—he was expecting the arrival of a Captain Smith within [807] two weeks and that at that time he would call Mr. Loew or myself to come to New York where we would—he would help us negotiate for the sale of these machines.

That was about the happenings at this meeting that I can recall outside of making a joke or something else which is not pertinent. I couldn't remember it verbatim.

Q. (By Mr. Mockabee): Did you prior to that meeting make a trip to Europe for the purpose of interesting prospective purchasers in your machine? A. Yes, I did.

Q. As a result of the meeting with Mr. Silberman did you do or refrain from doing anything as a result of the offer of Mr. Silberman not to sue you if you did not sell machines in Europe?

Mr. Leonard Lyon: If your Honor please, I object to the question, particularly the introduction of the question "As a result did you do certain things."

I think I am entitled to call your Honor's attention to the record in the case at this point. The deposition of Mr. Loew at page 34, which has been

(Testimony of Philip Lipson.)

offered in evidence by the plaintiff—Mr. Loew was asked this question:

“In response to that statement of Mr. Silberman’s in April of 1948 wherein he stated, according to your letter of February 4, 1952 to Mr. Lipson, that he knew his patent wouldn’t hold water and that he [808] wouldn’t enforce it against you if you stayed out of Europe, did you respond to that statement in any manner agreeing to such terms?

“A. No, we hadn’t any agreement whatsoever at that time.”

Now, this witness is asked “As a result,” which is a conclusion.

The Court: At best what Mr. Lyon is suggesting is a conflict in the evidence. The mere fact that one witness characterizes a conversation one way and another another, is only a conflict in the evidence.

Mr. Charles Lyon: They are trying to impeach their own witness by this statement here. Mr. Loew was their witness.

The Court: I don’t go along with that. A lawyer presents what evidence he has and he doesn’t vouch that each of his witnesses is going to tell a Chinese copy of the other witness’ testimony.

When that happens the Court is often inclined to think there is something amiss. It is when witnesses talk differently about things that sometimes you find the indicia of the truth.

Mr. Leonard Lyon: If your Honor followed this



(Testimony of Philip Lipson.)

witness' statement of the conversation you heard what he said Mr. Silberman offered and you heard what he said was his reply and without arguing it now, I don't think he is entitled to [809] say that he did so and so as a result of an agreement.

The Court: The question as I recall that is pending, is "As a result." You used the word "result." "As a result of Silberman's offer" and so forth "did you or did you refrain from doing anything."

Let us pass that question just for a moment and you can reframe it, counsel.

After this meeting at the Hollywood-Roosevelt Hotel did the Union Slide Fastener Company, the defendant, receive any communication from Mr. Silberman in which he withdrew this offer that he purportedly made to you?

The Witness: There wasn't any communication of withdrawing the offer. However, there was—there are some circumstances that followed this here which would enlighten the court as to what transpired.

I only related as to what transpired at that particular meeting because there was a conflict between Mr. Loew and myself as to the acceptance of this. I was for it and Mr. Loew was against it.

Furthermore there was some doubt in Mr. Loew's mind because he evidently felt guilty of something that he did and that he didn't want to disclose and he was afraid to go to New York. I was going to bring that out in the testimony.

The Court: Well, a lot of that is not going to be

(Testimony of Philip Lipson.)

pertinent, I don't believe. There was a disagreement between [810] you and Loew?

The Witness: That is right, but no machines were sold or shipped to Europe after this Silberman offer.

Q. (By Mr. Mockabee): Mr. Lipson, why did you not ship any machines or attempt to sell any machines in Europe after that time?

Mr. Leonard Lyon: I object to that question, your Honor, as calling for a conclusion.

The Court: Certainly a witness can tell why he did something.

Mr. Leonard Lyon: That is a state of mind.

The Court: Well, how would we ever know what a man's state of mind is unless he tells us.

Mr. Leonard Lyon: There is an old saying that the devil himself only knows the mind of man.

The Court: Overruled. You may answer.

The Witness: May I correct my counsel's—or, may I comment on my counsel's question. I didn't say "attempt." I said we did not sell or ship machines to Europe.

Q. (By Mr. Mockabee): Why did you not do so?

A. Why I did not sell or ship machines to Europe? Because I did not want to tread on thin ice. I was afraid—I did not know the exact proceedings.

I at that time had doubts as to the sincerity of Mr. Loew's statements to me and I was afraid that he misrepresented [811] certain facts when I be-

(Testimony of Philip Lipson.)

came a partner, and that led to certain things that in spite of what Mr. Loew—I was in charge of the office, in charge of correspondence of the Union Slide Fastener and Mr. Loew often told me to do something and I didn't say yes and I didn't say no and I didn't do it if I thought it wasn't right.

The Court: All right, go ahead.

Q. (By Mr. Mockabee): Did the offer of Mr. Silberman not sue Union Slide Fastener have anything to do with your decision not to sell machines in Europe?

Mr. Leonard Lyon: I object to that as calling for a conclusion.

Mr. Mockabee: Your Honor, if a man threatens to knock you over the head if you won't do something I think as a natural result of that offer or threat to knock you over the head is going to have a direct bearing on the subsequent action to whom it is directed.

The Court: Well, the objection is sustained as to the form of the question. You were asked by your counsel why you did not sell or ship machines to Europe. Have you given a complete answer to that question?

The Witness: Yes. I said I did not want to tread on thin ice. I wasn't sure whether the Silberman patent was good or not.

Mr. Loew claimed it wasn't worth the paper it was on. [812] I heard from Mr. Silberman himself that he—that his patent as well as Mr. Loew's, he expressed, wouldn't hold water in court.

(Testimony of Philip Lipson.)

Now, we had good prospects in Europe. I didn't know what was what so I presumably carried on correspondence with some of these prospects in Europe. I didn't deny that. But I had made up my mind and I told Mr. Loew too, that we will not ship any machines to Europe until this matter is clarified, whether Mr. Silberman's patent is right or isn't right. There was some doubt in my mind as to that.

Q. (By Mr. Mockabee): If you decided the patent was valid would you have refrained from shipping machines to Europe? A. Yes.

Q. If you had decided it wasn't very strong would you have shipped machines to Europe?

A. Not before I would have consulted Mr. Silberman and stated that to him.

Q. In other words——

Mr. Leonard Lyon: If your Honor please, I move to strike the answer as speculative and not calling for a fact.

The Court: The last answer is something that you could make something out of. You don't want to strike it out, do you?

Read the last question and answer. [813]

(Question and answer read as follows: "Q. If you decided that the patent was valid would you have refrained from shipping machines to Europe? A. Yes. Q. If you had decided it wasn't very strong would you have shipped machines to Europe? A. Not before I would

(Testimony of Philip Lipson.)

have consulted Mr. Silberman and stated that to him.'')

Mr. Leonard Lyon: He is asking if so and so happened would you have done so and so and that is speculation.

The Court: You want to strike it?

Mr. Leonard Lyon: Well, the way your Honor is indicating it I don't believe I should. You must see something in it that I don't see.

The Court: Well, it is up to you.

Mr. Leonard Lyon: I will withdraw the objection.

Mr. Mockabee: Maybe I should strike it. I will leave it in for what it is worth.

Q. (By Mr. Mockabee): Did you have prospects on a fairly good European market from the investigation you made while you were in Europe and the correspondence you had?

A. I believe so.

Q. Did the conversation with Mr. Silberman at the Hollywood-Roosevelt Hotel which you have related, have anything to do with your refraining from selling machines in Europe? [814]

Mr. Leonard Lyon: The same objection.

The Court: Sustained. I have given the witness a lot of latitude to give his reasons why he did or did not sell to Europe. He stated a lot of matters. Now you are asking him a direct question on the matter. I think you have covered it.

Q. (By Mr. Mockabee): Mr. Lipson, you mentioned some events subsequent to the meeting with



(Testimony of Philip Lipson.)

Mr. Silberman at the Hollywood-Roosevelt Hotel. You referred to some of them. Is that the complete story of the subsequent events?

A. Yes. We came—Mr. Loew and myself, when we left the meeting, were arguing about Mr. Silberman's proposition, and my agreeing to it, because I did make that an acceptance.

The Court: That may go out. That is your conclusion whether or not you accepted it. Your statement in the record was that you said to Silberman, "Your proposition is good, I believe we will accept it, but there is only one thing," and you went ahead and told him about these machines?

The Witness: Yes.

The Court: All right.

The Witness: I asked him whether he would help me.

When we left, Mr. Loew accused me of making a statement, which he may not have agreed to. He said he doesn't agree to, because—may I state what Mr. Loew told me?

The Court: I don't think we are concerned with what you [815] or Mr. Loew thereafter said. You have already stated—I let you state that you and he were in disagreement.

The Witness: We were in disagreement.

The Court: That ought to cover it.

Mr. Leonard Lyon: I don't think it has been brought out, your Honor, what the capacity of

(Testimony of Philip Lipson.)

these two men were at this conversation, what authority each one of them had.

The Court: At the time of that conversation, what was Loew's capacity with the company?

The Witness: Officially he was president. There was a situation in the Union Slide Fastener Company which was rather unique. The Union Slide Fastener, Inc., was presumably a corporation, but it had never transferred assets to the corporation. It had no charter to issue stock. This was sort of more like a dormant corporation. Officially Mr. Loew was president. I wasn't even an officer in the corporation at the time.

Mr. Mockabee: Your Honor, I believe that we can consider that all reference to associations between Mr. Loew and Mr. Lipson occurred during the time they were in association in the Union Slide Fastener Company, and the only reference to activities of Loew, other than during that time, was at the time of the Loew deposition, and subsequent to a considerable amount of discussion, disagreement, and the break-up between Mr. Loew and Mr. Lipson. [816]

The Court: Counsel, your statement is not evidence, and the witness is just now telling us—see if I understand it. There was a dormant corporation, no permit to issue stock, and the assets had actually then been owned by the Union Slide Fastener as a fictitious name, I suppose, which was going to transfer, eventually, to Union Slide, the corporation?

(Testimony of Philip Lipson.)

The Witness: The Union Slide—I am not familiar with corporation law—it had a charter to the name, but in order to issue stock, as I understood, it had to transfer the assets and show a value of the assets. One of the reasons why we couldn't do that was it was a peculiar way that I entered into that business.

The Court: We understand that. No permit had been issued, and no stock had been transferred, nor had the assets been transferred to the corporation.

The Witness: That is correct.

The Court: All right. Who held the assets? Was it yourself and Loew in some business arrangement between the two of you?

The Witness: We had an agreement that I was 50 per cent shareholder in the business; according to what my accountant told me we were apparently a partnership, or he called it a dormant corporation.

The Court: And you previously had bought a 50 per cent interest in the business? [817]

The Witness: According to a bill of sale, yes.

The Court: All right.

Mr. Leonard Lyon: And Mr. Loew the other 50 per cent?

The Court: Did Mr. Loew have the other 50 per cent?

The Witness: Mr. Loew and his wife, and my wife and myself, were supposed to be the partners in the business.

(Testimony of Philip Lipson.)

Mr. Mockabee: Your Honor, I made my statement, just to try to clarify things a little bit. Is it not true——

The Court: This seems very clear to me, unless there is some objection to it, unless you want to go further into it.

Mr. Mockabee: I was just making the remark that all through the testimony any reference to activities of Mr. Loew and Mr. Lipson——

Mr. Leonard Lyon: I wonder if the witness should be instructed to bring in the partnership agreement which he says was in writing, or the agreement that he says was in writing between him and Mr. Loew. I still think it might become material as to who had the right to bind this interest, whatever it was, in any agreement with Mr. Silberman.

The Court: All right. Just a minute. Let Mr. Mockabee complete his statement, which he never has had a chance to complete, which he thinks is important.

Mr. Mockabee: That is all right. I will continue.

The Court: All right.

Mr. Witness, do you have any of the documents on this [818] deal that you had with Loew?

The Witness: I am trying to locate them, your Honor. They were given at one time to an attorney in some litigation between Mr. Loew and myself, and the next time they were given to another attorney who was trying to get some financial aid

(Testimony of Philip Lipson.)

to our business, he was also trying to get some people interested in this litigation that is proceeding now, to help me, and I am trying to locate this. In either case they told me that they had returned it to me.

The Court: If you can find them, bring them in.

The Witness: I will, your Honor.

The Court: Let me ask this further question.

At some subsequent date was stock issued in the corporation to you and your wife?

The Witness: Yes, your Honor.

The Court: Do you know about what date that was?

The Witness: That was in 1949, your Honor.

The Court: At that time was 50 per cent of the stock issued to you and your wife?

The Witness: Yes, your Honor.

The Court: And I take it——

The Witness: May I correct myself?

The Court: Yes.

The Witness: There was 40 to myself, 40 to my wife, and 20 to my children. [819]

The Court: That would be 60?

The Witness: 40, 40 and 20.

The Court: That would be 100?

The Witness: Yes.

The Court: At that time was there any stock issued to Loew?

The Witness: Mr. Loew was no longer with the company.

The Court: So by the time the stock was issued



(Testimony of Philip Lipson.)

to you, you and Loew had split up?

The Witness: That is correct.

The Court: So you and your family got all the stock?

The Witness: That is correct, your Honor.

The Court: What date was it that you and Loew split up?

The Witness: March 21, 1949.

The Court: Go ahead.

Mr. Mockabee: Your Honor, regarding the necessity of trying to dig up this agreement, which Mr. Lipson has been trying to find, I think it is a matter of record and stipulated that defendant's Exhibit P, letters and copies of letters in a series, regarding the visit of Mr. McKee to inspect the machinery of Union Slide Fastener, shows clearly that the plaintiff was corresponding with and dealing with Union Slide Fastener, Mr. Loew and Mr. Lipson, all as one and the same entity as far as they were concerned.

The Court: Well, I don't attach much significance to [820] this, unless you want to insist upon it being dug up, Mr. Lyon, for this reason: I haven't read the Loew deposition, but I take it that we will find that Loew and Lipson went to this conference. Now, if Loew only went to the conference as a mechanic, an employee, to advise—pardon me. If Lipson only went to the conference as a mechanic or mechanical advisor to Loew, undoubtedly he wouldn't have participated in this conversation. Regardless of what the conversation

(Testimony of Philip Lipson.)

was, both Loew's testimony and Lipson's will show that Lipson participated and took a part in it.

Mr. Leonard Lyon: Yes.

The Court: If that is true, the only inference is that he had something to say about the company.

You wouldn't have a hired man stick his nose into——

Mr. Leonard Lyon: Yes, but as I understand the witness' testimony, Mr. Loew did not agree to make the agreement, that the witness is trying to say was made. And here were two men and they had apparently equal say. I think the court has got to decide whether under those circumstances there is one item in this—could there have been an agreement?

The Court: You have a very good point. That is a matter for argument. I don't have to decide these as I go along.

Mr. Leonard Lyon: All right.

Mr. Mockabee: Your Honor, I believe from our standpoint it is not so much a matter of showing the consummation of an [821] agreement at the time of that meeting, but the fact that the defendant refrained from selling in Europe was the important fact in the following through, in reliance upon the offer of Silberman at the time of that meeting.

The Court: Let me ask this question, then.

You carried on correspondence with these contacts in Europe for a while?

The Witness: Yes, your Honor.

(Testimony of Philip Lipson.)

The Court: Did you carry those contacts on after March 21, 1949, after Loew split up with you?

The Witness: In a restraining way, your Honor. I was trying to put the brakes on. May I recite one instance that will illustrate this clearly, as to Mr. Lyon's objection as to my authority and Mr. Loew's authority? That would clear it up if I was permitted to state that.

The Court: You state it, and if it is not proper we will strike it out. I don't know what you are going to state.

The Witness: I was in charge of the office, I had been a businessman for many years, Mr. Loew had never been in business for himself, except as an engineer working for somebody else. He recognized my experience in business and in making agreements. He only criticized me why I accepted that or stated it in the manner that I did. Now, there was a point that two or three weeks later we received a letter from a [822] company in Germany called Nagele Company.

The Court: Spell it.

The Witness: N-a-g-e-l-e. The Nagele Company was considered to be the granddaddy of European zipper machinery. They had made machinery, which I believe counsel for the plaintiff has stated was cumbersome, and so on. We received a letter from them stating that they wanted five machines. They themselves hadn't seen our machines, because they were not invited, but they had had representatives of theirs, indirectly, they were connected with

(Testimony of Philip Lipson.)

some other companies in other European countries, that they had had a report on our machine, they were interested to buy five machines for their own factory, and whether we would be interested if they would become our agents for European countries and elsewhere, because they had good prestige in the zipper industry.

Now, Mr. Loew stated that I should write a letter to them stating the price and giving the dates of deliveries. And I didn't disagree with him, but I didn't write the letter.

Two weeks later Mr. Loew comes to me, "We ought to have a letter from Nagele."

At that time I couldn't stomach the—maybe you will strike it out, but I will say it—the two-facedness from Mr. Loew, and I told him that I didn't write this letter and I won't write it. "If you want to do business with Nagele, you do it on your own hook, but a company that I am in partnership [823] with will never do business with Nagele."

That was one of the things that caused the rift, because I believed that in business you have to uphold principles regardless of things, Mr. Loew believed that you could do anything as long as you make a profit. And that was the main basis of the disagreements between Mr. Loew and myself, and we parted in not a friendly manner.

When Mr. Loew gave the testimony on this deposition, he had promised that he will give it in a truthful manner if I release him of certain things where we had some litigation between us, and he

(Testimony of Philip Lipson.)

had promised that he will help me to settle this Talon case. When it came to the deposition, I would say that Mr. Loew spoke from both sides of his mouth.

The Court: All this reference to the deposition may go out. It will be stricken.

Q. (By Mr. Mockabee): Mr. Lipson, up to the time you and Loew split or severed your business connection, you had not sold any machines in Europe, is that true? A. No.

Q. After the split with Mr. Loew, and the present corporation was formed, have any machines been sold in Europe?

A. We have not sold any machines. The corporation, or the firm prior to the corporation, has not sold any machines to Europe, or England, since that meeting with Mr. Silberman, and up to date.

The reason that I had made that statement, when you said attempted to sell, many of European manufacturers had branches or financial connections with factories in South America or Africa, or Australia, and in conducting correspondence with them and outlining our machine, we stated to them that our machine is a double header machine of that type, and in most cases I stated to them that we are restricted in the selling of this machine, that we cannot sell in Europe. And our object in answering those letters was only to the effect that we might—that a sale might materialize in other countries.

The Court: This reference about these letters



(Testimony of Philip Lipson.)

will go out. If you have got any letters of that sort, you bring them in.

The Witness: I do.

The Court: All the testimony about letters that you wrote and what they contained will be stricken.

Q. (By Mr. Mockabee): Mr. Lipson, I made reference a few moments ago to Defendant's Exhibit P, a series of letters between plaintiff and defendant and various members of both organizations, in which plaintiff suggested that defendant might be infringing certain of plaintiff's patents, and requested an opportunity to inspect the machinery in defendant's plant. Do you recall that correspondence and that period during which it occurred?

A. I noted from the deposition that there are two [825] letters of which I didn't know until the deposition was taken. They were withheld from me. The first one——

Q. Those letters are now in evidence, Mr. Lipson.

A. May I see them? I haven't got the deposition.

Mr. Mockabee: I think the clerk has them.

The Clerk: Which two?

The Court: We will take our recess. You may look them over.

I take it you are going into another subject matter now?

Mr. Mockabee: Yes.

(Recess taken.) [826]

The Court: You may proceed.

Q. (By Mr. Mockabee): Mr. Lipson, I refer you

(Testimony of Philip Lipson.)

to Defendant's Exhibit P, and in the back of that deposition are copies of correspondence I just referred to.

The Court: The deposition is Q.

Mr. Mockabee: I beg your pardon.

The Court: Somebody on their copy has put an erroneous number on it.

Mr. Mockabee: Oh, I think it was used at the time of the deposition, the letter O.

The Court: You are referring to Exhibit Q. As I recall it these letters went into evidence separately and were given separated exhibit numbers. Go ahead.

Mr. Leonard Lyon: Is there a question pending?

Mr. Mockabee: Not yet, no.

Q. (By Mr. Mockabee): Do you recall the receipt of Exhibits Q-1 and Q-2?

The Clerk: P-1 and P-2.

The Court: It is Q. The Exhibit Q and not P.

The Clerk: I thought he was talking about the letter, pardon me.

The Court: The exhibit is Q.

The Clerk: The Exhibit is Q.

The Court: And I take it the letters are in the Q series. [827]

Mr. Mockabee: I think we gave the letter P to the series of letters and the letter Q to the deposition.

The Witness: Here are the letters, your Honor.

The Clerk: The deposition hadn't been offered at that time.

(Testimony of Philip Lipson.)

The Court: All right.

Mr. Mockabee: Then I will refer to them as P-1 and P-2 dated May 17, 1947 and June 16, 1947 respectively.

Q. (By Mr. Mockabee): Do you recall the receipt of the first letter, P-1, by Union Slide and its response P-2?

A. The first letter is dated May 17, 1947. That is P-1. It is from Evans & McCoy, patent lawyers, Bulkley Building, Cleveland 15.

Q. Mr. Lipson, the letters are in evidence.

The Court: Do you recall the receipt of it or was that before you were with the company?

The Witness: That was before I was in the company.

The Court: The reply, Exhibit P-2, dated June 6th was also before you were with the company?

The Witness: No, I was in the company already but the, first letter and the reply was withheld from me for—I did not know about it until a later date.

Mr. Charles Lyon: If it is any materiality, your Honor, I think the record should show that no one has testified that Exhibit P-2 was ever sent. Mr. Loew did not testify [828] it was sent. He did not know whether it was sent or not and the records of our company do not show the receipt of any such letter.

Mr. Mockabee: Is an objection being made to Exhibit P-2?

Mr. Charles Lyon: I am just pointing that out.

(Testimony of Philip Lipson.)

There is no testimony in this case that any such letter as P-2 was sent.

The Court: That is information for the benefit of the court. He is simply calling my attention to it. Let us go ahead.

The witness has said he knew nothing about either of the letters until some later date.

Q. (By Mr. Mockabee): There is a letter, Exhibit P-4, which was apparently written by you personally to Evans & McCoy dated September 23?

A. Yes, I have that letter before me.

Q. In that letter you state to the best of your knowledge you do not employ any methods of operation similar to those of Talon. On what did you base that statement?

A. I based that statement on the information given me by Mr. Loew.

I personally didn't know much about zippers at that time. I had just been in the company a short while.

Q. What was your understanding of the situation with regard to the charge of infringing——

Mr. Leonard Lyon: I object, your Honor. He couldn't have any understanding of it.

The Court: Sustained. He said he merely based it on information from Loew.

Q. (By Mr. Mockabee): I refer you to Exhibit P-5, a letter from Evans & McCoy dated September 26, 1947.

A. Yes, I have that before me.

Q. There is a list of five patents specified by

(Testimony of Philip Lipson.)

Mr. McCoy as being the subject of the exchange of correspondence and the claims of each patent are set forth opposite the identification of the patent.

In the patent numbers do you find either of the patents in suit?

Mr. Leonard Lyon: I think that speaks for itself.

The Court: '017 is there. It speaks for itself. Go ahead.

Mr. Leonard Lyon: And at that time, your Honor, the plaintiff didn't own the Silberman patent.

The Court: That is right.

Q. (By Mr. Mockabee): In your letter of November 20th, Exhibit P-7, you state that Union Slide Fastener was operating under a license from Universal Button Company. Do you have that license?

A. Is that in the second paragraph?

Q. That is in the third paragraph. [830]

A. Yes, I see the third paragraph.

The Court: The question is do you have that license that you are talking about?

The Witness: That license was not issued to the Union Slide Fastener Company. That was a license to Mr. Loew. That license was later on shared by Mr. Loew and myself and assigned to Union Slide Fastener Company—the right to use that license.

Th Court: Do you have the license? That is the question.

The Witness: The license is together with a photostatic copy, together with those papers that I



(Testimony of Philip Lipson.)

am looking for, the agreement papers. The original is owned by Mr. Loew.

Q. (By Mr. Mockabee): And I believe the testimony shows that Mr. Loew is in Israel and not available.

Was the license referred to in Exhibit P-7 any part of the consideration of your entry into business with Mr. Loew?           A. Yes.

Mr. Leonard Lyon: Did you say yes or no?

The Witness: I said yes.

The Court: Well, if you can't find the license can you tell us what the patent was that it was licensed under?

The Witness: It was under the Loew patent.

The Court: The Loew patent, which is Exhibit O, this exhibit here?

The Witness: Yes, your Honor.

The Court: That time that you are talking about is the date of the letter of November 20, '47, the Loew patent hadn't issued, it wasn't issued until July 6, '48.

The Witness: There was a license under a pending patent. The license had been assigned to——

Mr. Leonard Lyon: I call your attention to the fact that the patent was actually issued on July 6, 1948, to Mr. Loew, and this is supposed to be a license from the Universal Button Company.

The Court: Yes. What do you say about that? How did Universal Button get into it?

The Witness: Mr. Loew was an employee of

(Testimony of Philip Lipson.)

Universal Button Company at the time the patent was applied for. It was applied in his name, and before he terminated his employment with the Universal Button Company, he had sold this patent or assigned it to them, taking in return a license to operate 20 machines under this patent.

The Court: So that Universal Button owned the patent?

The Witness: The pending patent.

The Court: The pending patent, and later on the patent?

The Witness: That is correct.

The Court: And Loew had a license to operate 20 machines? [832]

The Witness: Yes, 20 machines under this patent.

Q. (By Mr. Mockabee): I refer you to Exhibit P-10, letter from Evans & McCoy of January 20, 1948, stating that Mr. McKee would be on the West Coast within the next few months and would arrange at that time for an inspection of Union Slide Fastener Company's equipment. Did Mr. McKee make such a visit to the plant? A. Yes.

Q. Will you state briefly what occurred at the time of his visit?

Mr. Leonard Lyon: If your Honor please, this apparently is evidence being offered under paragraph K of the defendant's answer, amended answer, in which defendant pleads that on the occasion of the visit with Mr. McKee he stated to the defendant's representatives that the machines and

(Testimony of Philip Lipson.)

the methods employed by the defendant did not infringe any letters patent owned by the plaintiff. The witness has been asked to just state briefly what happened on this occasion of this meeting. I am going to ask—I don't want to be captious—that the same scrutiny and the same protection be accorded his examination in regard to this subject as in connection with the previous conversations with Mr. Silberman. Because here, again, Mr. Loew was present, and Mr. Loew in his deposition, which has been offered by defendant, stated that there was no such statement made by Mr. McKee. [833]

So I want to be careful in this witness not just stating briefly something, but stating what the actual conversation was.

The Court: All right. Of course, two witnesses may give different testimony, but the court will compare the testimony of Loew and of Lipson.

Now, again, don't give us your conclusions. Tell us what you said to Mr. McKee and what McKee said to you.

Mr. Mockabee: If the court please, I think counsel for the plaintiff will have the proper opportunity at the proper time to make these comparisons, rather, than interrupting the chain of our questioning.

The Court: Let's go ahead.

Mr. Mockabee: Have you answered the question, Mr. Lipson?

The Witness: I don't remember what the question was.

(Testimony of Philip Lipson.)

The Court: Read it, Mr. Reporter.

(The question referred to was read by the reporter, as follows: "Q. Will you state briefly what occurred at the time of his visit?")

The Witness: Mr. McKee arrived at the factory while I was there, and Mr. Loew was there. I don't remember whether he arrived by taxi or otherwise, but he arrived, and he came in and we exchanged a few greetings and pleasantries, and then [834] Mr. Loew stated that he was going to take Mr. McKee through the plant. Mr. McKee was acquainted with him, I understand, or it was told to me. I remained in the office. And after an interval of about a half hour or so I heard Mr. McKee and Mr. Loew entering an adjoining office, to which the door was open. My office was the main office of the building, and an adjoining office was one that was used for a drafting table, for keeping drawings, and I heard them discuss a machine that was being designed by us to manufacture No. 2 zippers, that is a feather-weight zipper, a very light zipper. I heard Mr. McKee state to Mr. Loew that he would be interested in that particular machine for No. 2 zippers, because his company wasn't satisfied with the method they used for manufacturing that feather-weight zipper. And Mr. Loew promised to send him the information as to the speed and the manner in which it operates, as soon as the tests are completed.

The Mr. Loew during that conversation asked Mr. McKee, "What is your opinion of our machines? Do you think that they infringe on your patents?"

(Testimony of Philip Lipson.)

And Mr. McKee said that his personal opinion was that he didn't see any infringement of any of the Talon patents held.

They continued the conversation I wasn't in that office, but I heard it—they continued talking about various other problems in the zipper industry, and a few minutes later they came into the office where I was sitting, and I got [835] up and we discussed, and I wanted to make sure as to what the opinion was, and I said to Mr. McKee, "I heard you were interested in our No. 2 machine, and I heard your conversation in the other office, and I am glad that you see that we are not trying to do something which isn't right," or words to that effect.

After that Mr. McKee left.

Mr. Leonard Lyon: I don't think it has been fixed, your Honor, whether Mr. Loew was present in this conversation that was supposed to have taken place in the witness' office.

The Court: This latter part of the conversation, was Mr. Loew present?

The Witness: Yes, Mr. Loew was there. I couldn't recall whether he stepped out for a few minutes or not, but he brought him in, and whether he stepped out for a few minutes or not I cannot recall that. I know he was there when Mr. McKee left.

Q. (By Mr. Mockabee): As far as you can recall, Mr. Loew was present, is that true?

A. That is correct.

Q. This visit of Mr. McKee was when?



(Testimony of Philip Lipson.)

A. In April 1948. It was either the early part of April or perhaps the end of March.

Mr. Charles Lyon: We agreed in the deposition it was [836] April 15, 1948. See page 18 of the deposition of Loew.

Q. (By Mr. Mockabee): Did anyone else from plaintiff's organization make any inspection of Union Slide Fastener Company's machines prior to the filing of suit?

A. Not to my knowledge.

Q. Do you ordinarily permit visiting and inspection of your plant? A. No.

Q. After the statement of Mr. McKee that you were not infringing plaintiff's patents, did you rely upon that statement in your operations after that time?

Mr. Leonard Lyon: I object to that as calling for a conclusion, your Honor.

The Court: Objection overruled. You may answer yes or no, and then tell us what that reliance consisted of.

The Witness: Yes, we did.

Q. (By Mr. Mockabee): What did you do?

A. We continued manufacturing on the machines we were using at that time. They were the double header chain machines.

Q. Did you expand your facilities at all?

A. Oh, yes, we did.

Q. In what manner?

A. We produced more machines, we installed

(Testimony of Philip Lipson.)

other equipment for the assembling of the zippers, we expanded our [837] facilities in general. Mainly we added other machines to it, other zipper chain machines.

The Court: You would have expanded and continued your manufacturing anyhow, if McKee had not made the visit, would you not?

The Witness: Except for one thing, your Honor. This visit happened shortly after Mr. Loew and I were in partners. Had Mr. McKee stated to me that we were infringing on the Talon patent, I would have instituted immediately suit against Mr. Loew to return the money I invested and the money I paid for the patent. And the reliance on the statement that Mr. McKee made not only assured me that I can continue, but has also been a factor in the matter that I purchased out Mr. Loew's interest in the business later.

Your Honor, I certainly would have been a very moronic businessman had I bought out a share in a business that was infringing on Talon patents, and later on, as was the case, Silberman's patent.

The Court: Would you have taken McKee's word for it as if he were the Supreme Court, to decide whether patents were infringed or not?

The Witness: When the man is the vice president of corporation, and he is sent to our company to see whether we are infringing or not, and I received a letter from the corporation that he was the man to inspect it, and I naturally [838] expected

(Testimony of Philip Lipson.)

this man to be an authority on it, and when this man who is the vice president of Talon tells me that in his opinion we are not infringing, and as a matter of fact he later in a subsequent transaction, he helped our company to test that No. 2 machine by sending—that happened during my trip to Europe, but there are letters to substantiate it—he helped our company, he sent us some tape, it is a special tape that is used only on No. 2 zippers, which we couldn't obtain, he sent us that to test that machine in which he was interested.

The Court: Well, let's pass the No. 2 machine for a minute. You told us what your position was when he told you you did not infringe. But suppose he told you that you infringed, do you mean you would have immediately folded up without further inquiry than merely his word that you were infringing? [839]

The Witness: Well, I would have taken steps with a patent attorney to find out and if I had found out that we were infringing and there would be no sense in my paying a large sum—I understand I am not supposed to state what it was, the sum of \$20,000 for sharing in a license to a patent which was supposed to give us the right to work.

The Court: Well, now, wait just a minute. But you subsequently did make an investigation as to whether or not you infringed?

The Witness: Only——

The Court: Before the trial of this action.

The Witness: Yes, I did.

(Testimony of Philip Lipson.)

The Court: And you decided that you did not infringe?

The Witness: That is correct, your Honor.

The Court: So if you had made the same inquiry after McKee's visit, had he told you that you did infringe you would, I assume, have arrived at the same conclusion that you did not infringe?

The Witness: The only thing, your Honor, is that the burden of standing the cost of such investigation would have been upon Mr. Loew.

The Court: What I am getting at is this. The fact you say you expanded and continued to operate, I am asking you if it isn't a fact that you would have done both of those things even if McKee had told you you were infringing? [840]

The Witness: No,—not until I was sure that we didn't.

The Court: But you have since made that investigation?

The Witness: Yes.

The Court: And you since decided that you didn't infringe either of the Poux patent '017 which was then in existence——

The Witness: That is right.

The Court: And you since decided you did not infringe Silberman '793?

The Witness: That is correct.

The Court: Now, had you made the same investigation earlier isn't it logical you would have arrived at the same conclusion as to the Poux patent '017?

(Testimony of Philip Lipson.)

The Witness: That is correct.

The Court: And isn't it logical you would have gone ahead and continued the business and expanded even though he told you you did infringe?

The Witness: That is correct.

The Court: All right.

Q. (By Mr. Mockabee): Did you receive any communication in any manner from plaintiff subsequent to Mr. McKee's visit to your plant until the time of the filing of the complaint?

A. The only evidence offered was a letter from Mr. McKee and a piece of tape which I have seen at our shop when I returned from Europe. [841]

The letter was received from him during my absence in Europe and I read that letter but I cannot testify that I received it.

It was in the files of the corporation and I believe it is in evidence here. At least it was attached to my copy.

The Court: Is the letter in evidence? It is dated June 22nd, I believe.

Mr. Mockabee: It is attached to the original deposition, I believe. I don't know that it is admitted in evidence.

The Witness: It is marked here Exhibit P-9 and is dated June 25, 1948.

Q. (By Mr. Mockabee): That letter, Mr. Lipson, does not make any reference to the question of infringement which had previously been raised, does it?      A. No.



(Testimony of Philip Lipson.)

The Court: What was the number of that letter—the Exhibit number?

The Witness: P-9, your Honor.

The Court: Now, this zipper machine or No. 2 featherweight zippers that you were building in the plant and McKee saw, was that generally similar except for the fact it worked on a smaller zipper, to other of your machines at the Union Slide?

The Witness: That is correct. But to correct the impression, your Honor, the machine was in the planning stage [842] on the board. It was not built yet.

The Court: But it was the same as your other machines as of that date?

The Witness: That is correct, yes.

Q. (By Mr. Mockabee): I will ask you if you can recall a meeting held in Los Angeles of the plaintiff sometime during 1949, between plaintiff's representatives and local slide manufacturers—slide fastening manufacturers? A. Yes, I do.

Q. Can you pinpoint down the date more accurately than that?

A. Yes. It was September 29, 1949.

The Court: Held in Los Angeles office of Talon?

The Witness: Yes.

Mr. Leonard Lyon: But the question was in the presence of officers of Talon. They were the sales representatives out here. They are not officers of the Talon company.

Mr. Mockabee: I don't know that I said officers. I said representatives.

(Testimony of Philip Lipson.)

The Court: He said representatives.

Mr. Mockabee: Who was present at that meeting?

The Witness: A Mr. Jager who represented himself as the district salesmanager of Talon, Inc.

Mr. Detweiler, who represented himself as the local salesmanager. [843]

Mr. Isadore Napp——

The Court: N-a-p-p or K-n-a-p-p?

The Witness: No, no, it is N-a-p-p.

The Clerk: And I think the Jager is spelled with a J, too.

The Court: All right, go ahead.

The Witness: And his brother-in-law and partner Mr. Bogash.

The Court: Who were they?

The Witness: They were representatives of a firm called Roxy Company, manufacturers of stream-lined zippers.

The Court: Who else was present?

The Witness: Mr. Eisenberg, the representative of California Slide Fastener, Inc. and myself, Philip Lipson, representative of Union Slide Fastener, Inc.

Q. (By Mr. Mockabee): Who presided at the meeting?

A. I don't know if you would call it presided, but Mr. Jager opened the meeting and made the initial speech.

Q. Who was it?

(Testimony of Philip Lipson.)

A. He was at the head of the table so to say, and the others were at the side.

The Court: This man you call Jager, is that spelled J-a-g-e-r?

The Witness: Yes, J-a-g-e-r. I pronounce it maybe the German way. [844]

Q. (By Mr. Mockabee): What did he say in his opening speech?

Mr. Leonard Lyon: I don't know if he made an opening speech.

Mr. Mockabee: The witness said he did.

The Court: The witness said he made an opening speech.

The Witness: He stated that he was going to be brief about it.

He stated that conditions in the zipper industry are not the way he wanted them to be; that the Talon company had recently reduced the price of their skirt zippers, which is a No. 3, 7 inch length zipper, to five cents from its previous price which, I believe, was somewhere around seven cents. I am not sure of that.

That the reason they did that was to recapture the market in shirt zippers which they had practically lost to the smaller manufacturers.

That as long as the smaller manufacturers sold these zippers for four and a half cents, which is a half cent below the reduced Talon price, they did not mind it at all because by virtue of their advertising and their known name, their reputation, they

(Testimony of Philip Lipson.)

can always get a half cent more than the other small manufacturers.

But it had come to his attention that small manufacturers were giving hidden discounts and he explained it, that you [845] put on your invoice, bill, seven-inch zippers at four and a half cents and put down the terms as two per cent 10 days EOM, which means end of month. But that you permit the manufacturer to deduct the 10 per cent from his remittance on net and he called that a hidden discount.

That another form of hidden discount was to put in 110 zippers into a box marked 100 and that the customer would know and would be told and that was equivalent to giving him a, roughly, a 10 per cent discount.

That in doing that they were defeating the purpose that Talon had made in reducing their zippers to five cents and that in the eastern states the Talon company had brought out and was pushing the sales of a zipper under the name "Wilzip."

The Court: How do you spell that?

The Witness: W-i-l-z-i-p, I believe.

Mr. Mockabee: That is correct.

The Witness: And that this zipper in the east was sold at three and a half cents and sometimes even for three cents; and that his home office wanted Mr. Jager to bring that zipper into the West Coast area and that he could not restrain them from doing it although he personally didn't like it.

(Testimony of Philip Lipson.)

But that the matter of pushing that zipper and the matter of the price at which it will be selling depended on whether the small manufacturers would clean house—if they would stop giving discounts or selling below four and a half cents [846] under any pretext.

Then he said: “You fellows know what happened to the small eastern manufacturers when Talon brought their Wilzip zipper out and sold it at a lower price.”

He said a few more things that he himself didn’t like it and even though he had to bring the zipper in that it would be his policy not to push it or to refrain from selling it like offering it.

He mentioned those like offering those to those who wanted to buy Wilzip zippers and that they would have to come from the home factory and be shipped.

He also stated things that they may offer it just in certain colors or lengths and that the manner in which they offer it and whether they push the sales or whether they refrain from it depended on whether they could sell a lot of the other zippers under the Talon name at five cents.

That is the gist—what Mr. Jager said.

Is that what the question was?

The Court: Yes.

Mr. Leonard Lyon: Pretty late to find out.

Mr. Mockabee: That is correct, Mr. Lipson.

The Witness: The answer was yes.

Q. (By Mr. Mockabee): Did you engage in



(Testimony of Philip Lipson.)

practices referred to by you as hidden discount practices?

Mr. Leonard Lyon: I object to this as immaterial in [847] this case. The entire transaction had nothing to do with the patent situation and the defendant is not a public prosecutor and I don't know how there is any injury shown to the defendant or claimed by the defendant by this meeting.

If there is anything wrong about the meeting then the deposition of the other witness will show to the contrary.

The Court: Overruled.

Mr. Leonard Lyon: It would be a matter for the Attorney General. It wouldn't be a matter for this proceeding.

The Court: Much of what you say is true but it may have some bearing on some phases.

Answer the question yes or no. Did you engage in any of these hidden discount practices at that time?

The Witness: No.

Mr. Mockabee: I might state it is the defendant's position that the plaintiff has engaged in a number of or several at least, activities which we maintain are an attempt improperly to dominate the zipper industry and that this is one in the chain of events.

The Court: I understand your position and I overruled the objection.

I didn't complain about this coming in because this in itself wouldn't be a defense against the

(Testimony of Philip Lipson.)

plaintiff nor a cause of action or as a part of your counterclaim.

This might, however, have some bearing on trying to [848] determine what Talon's intent was in certain other of its activities.

Then of course it probably comes under the so-called "bad boy statute," where you tried to show somebody has been a bad boy and therefore everything else he did was wrong.

But the court will try to sort out what is proper and what is not proper.

Is that all of that meeting?

The Witness: Oh, no.

The Court: Was an agreement arrived at?

The Witness: No, no, there was no agreement arrived at.

Q. (By Mr. Mockabee): Will you proceed with anything else you can recall?

The Court: Are we interested in any more of this?

Mr. Mockabee: If it relates to the question of maintenance of prices in Southern California——

The Witness: Yes, it does.

Q. (By Mr. Mockabee): Will you proceed?

The Witness: Your Honor, if I may state before this meeting was called to order I arrived about 20 or 25 minutes early and I had a discussion with Mr. Jager personally prior to the meeting.

He told me the gist of the things that the meeting was about and I had asked him plainly: "Did you

(Testimony of Philip Lipson.)

find any of these practices by our firm?" And he stated no. [849]

But he said, "I can't say the same thing about the other gentlemen."

Now then we, after Mr. Jager made the speech and Mr. Napp of Roxy stood up and he said that he had been for 13 or 14—I don't remember the exact number of years, in the zipper business in Los Angeles and that he wasn't going to have anyone tell him what he should do or what he shouldn't do and that if Talon would sell their zippers at three cents he would sell it for two and a half and if they sold it for two and a half he would sell it for two cents.

But fortunately he wasn't depending on the zipper business to make a living because he stated he had a gold mine and he had some other interests.

After Mr. Napp stated that Mr. Eisenberg—no, I myself made the next statement.

I stated that we had difficulty in maintaining the quality of our zippers; that shortly prior to that I had taken over the control of a company that was noted prior to that for making a zipper that you couldn't sell to a customer twice—once was all, and that I had improved that zipper and I just recently finished these improvements at a great cost and that we were anxious to overcome the bad taste in some of our customers' mouths by offering a zipper that was even smoother than the other zippers offered and that, therefore, we had difficulty in being able to manufacture [850] a skirt zipper at four

(Testimony of Philip Lipson.)

and a half cents even; that at best we were breaking even, let alone selling at 10 per cent below.

I said that I certainly would be sorry to see a price war started but that if it came I would have no alternative but to meet the price. That was my answer to Mr. Jager. [851]

And Mr. Eisenberg, who was more or less pinpointed as the culprit in the matter of chiseling stood up and he said something in the same manner, something to the same effect, that he will sell—that he doesn't like a price war, and that he will meet competition if Talon brings the Wilzip zipper in and sells it at 3 cents, or whatever it was.

After that there was a general discussion. Mr. Detweiler hadn't said anything except when the meeting started to discuss generally, and then there was the usual arguments, each one accusing each other, but one point—nobody accused me of doing any of the dirty stuff. And after that the meeting ended.

Q. (By Mr. Mockabee): Getting away from the price war, price cutting, hidden discounts, and so forth, do you definitely recall Mr. Jager threatened to introduce Wilzip at a much lower price than the prices then in existence in Southern California, if the Southern California manufacturers did not maintain a four cent price?

A. Four and a half cents.

Mr. Leonard Lyon: I object to it as leading and suggestive.

Mr. Mockabee: He has already testified.

(Testimony of Philip Lipson.)

The Court: Then, sustained. It has already been covered.

Mr. Mockabee: I wanted to straighten it out a little bit.

Q. (By Mr. Mockabee): Were the Southern California manufacturers [852] actually brought into agreement upon a minimum price?

A. No.

Q. Was Wilzip introduced in Southern California? A. Yes, it was.

Q. Do you know about when it was introduced, from your knowledge?

A. I don't remember the exact date. And whether it was introduced on a broad scale or not, I couldn't say, because a few months after that the Korean police action or whatever you want to call it started, and it eliminated any possibility of chiseling, because of the fact that every customer was wanting to buy 50 times the amount of zippers that he was buying, and then when everyone placed orders that were 100 times the capacity of any manufacturer to produce there would be no reason for chiseling.

Q. Did Wilzip appear on the market after the Korean business?

A. No, Wilzip disappeared, to the best of my knowledge, suddenly disappeared from the market when the Korean war broke out.

Q. Have you ever heard of a zipper called the Falcon, F-a-l-c-o-n?

A. Yes, sir, I have heard of it, and I bought a



(Testimony of Philip Lipson.)

box of it from—not directly from my competitor, but I bought it [853] to analyze it how it was made.

Q. Who manufactures that zipper?

A. To the best of my knowledge, I was told that it was offered for sale by the Talon sales department in Los Angeles.

Q. Do you recall the price at which it sold?

Mr. Leonard Lyon: This is something the witness must have been told by somebody else, according to his testimony.

The Court: What is your purpose here? To try to show that Talon put out a cheap competitive zipper after the Wilzip zipper episode?

Mr. Mockabee: Yes, sir. Whether it is called Wilzip or Falcon, it is still a cheap zipper, and it followed the threat to cut prices with the Wilzip zipper, particularly, if they did not maintain prices, and showing by example the manner in which it had been introduced in the East, and the effect that it had back there. Just a follow-up of the threat.

The Court: The witness doesn't know that it was put out by Talon. Unless there can be a stipulation that it was, I will not receive the evidence.

Mr. Leonard Lyon: There is no argument about that, we do put out the Falcon zipper, Talon does.

The Court: All right. When did the Falcon zipper show up on the L. A. market?

The Witness: Well, the first that I noticed it was about two months ago, and I have a box of Falcon zippers here [854] in the court room.

(Testimony of Philip Lipson.)

Q. (By Mr. Mockabee): Did you purchase them?

A. I purchased it through a customer of mine who was buying those zippers. I did not purchase it directly from the Talon sales office.

Q. Did you pay your customer for them?

A. Yes, I did.

Q. What was the price of them?

A. \$3.00 one hundred.

Q. Three cents apiece? A. That's right.

Q. Referring back to the approximate time of the meeting in the offices of the Talon sales division in Los Angeles, in September 1949, prior to that time what was the importance of the garment industry in Southern California?

A. I don't understand the question.

Q. How important was the garment industry in Southern California prior to 1949?

The Court: Can't we save a lot of time? The court can almost take judicial notice that the garment industry in Southern California is probably second to New York, but considerably smaller.

Mr. Mockabee: Yes, sir. I was trying to bring out the approximate time of its growth and its rise to importance, relative to the interest of Talon in this particular market. [855]

The Court: What bearing would that have?

Mr. Mockabee: The fact that Talon didn't give a darn about the Southern California market until the garment industry had grown to appreciable im-

(Testimony of Philip Lipson.)

portance, and then it came in and tried to maintain prices.

The Court: Whether the market was small or large, if Talon was trying to illegally maintain prices, the only bearing it would have would be on Talon's intent and other matters, and whether this tied in with other illegal principles. The market wouldn't enter into it, would it?

Mr. Mockabee: All right. I won't go into it.

At the present time I believe that is all, your Honor. I would like permission, if I do happen to run across another point or two, to recall the witness if necessary.

The Court: Well, if you have something that you have to cover, you can do it on redirect.

Mr. Mockabee: All right, sir.

The Court: You are now ready for cross examination, is that right?

Mr. Leonard Lyon: I don't believe I will be very long, your Honor.

The Court: Will you have some rebuttal evidence?

Mr. Leonard Lyon: Yes, I have two witnesses in rebuttal, one of which is Mr. Burkitt in connection with his work for Mr. Silberman, and then I am going to recall Mr. Doble to [856] identify an exhibit, produce an exhibit on three of the claims that we are urging to the court, and he has tabulated the prior art and shown in his opinion what elements of the prior art are missing in those claims, and it is all on a chart and can all be done right out of

(Testimony of Philip Lipson.)

hand. I don't know how long counsel will want to cross examine on it.

The Court: Are you gentlemen telling me that we are coming, finally, to the end of this case?

Mr. Leonard Lyon: I am afraid so.

The Court: Have no fear about that. I will be glad when this is over.

Mr. Charles Lyon: Your Honor, I found a little earlier I may have made a misstatement. Mr. McCoy has found that he did receive Exhibit P-2. It is still true that Mr. Loew did not testify that he sent it.

The Court: That is the letter of which you said there was no evidence that it had ever been received?

Mr. Charles Lyon: Yes. We have found it in our files.

The Court: All right.

Mr. Leonard Lyon: I have one question that I would like to ask the witness before adjournment that will help me on scheduling the rest of the cross examination. [857]

### Cross Examination

Q. (By Mr. Leonard Lyon): When did you first learn of the issue of the Silberman patent?

A. I learned about the issue of the Silberman patent while I was in Europe.

Q. While you were in Europe?

A. That is correct.

Q. When did you first see a copy of it?

(Testimony of Philip Lipson.)

A. I had a chance to glance at the copy which one of our prospects brought in from Switzerland—he was a Swiss prospect, he brought it in, and he showed it to me, and he said, “Doesn’t this resemble the machine under the patent?” And I just glanced it over.

Q. You are talking now of the Silberman patent in suit here?      A. That is correct.

Q. When did you first obtain a copy of that patent?

A. Upon my return to the United States.

Q. When was that?      A. In July, 1948.

The Court: What months were you in Europe?

The Witness: I was in Europe during the months of May and June.

The Court: All right. [858]

The Witness: 1948.

Mr. Leonard Lyon: That is all I have right now, your Honor.

The Court: We will adjourn to 2:30. You probably have other work to do. Lawyers who get tied up in long trials find there is always work that piles up.

Mr. Leonard Lyon: Yes.

(Thereupon, at 12:00 o’clock noon, a recess was taken to 2:30 o’clock, p.m.) [859]

Thursday, March 10, 1955; 2:30 P.M.

The Court: You may proceed.

Mr. Mockabee: Will you take the stand, Mr. Lipson?



PHILIP LIPSON

called as a witness by the defendant, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Leonard Lyon): You have testified that the meeting in the Hollywood-Roosevelt Hotel attended by you and Mr. Silberman and Mr. Loew occurred sometime in August, 1948. Can you fix the date in August when that meeting occurred?

A. Approximately between the 10th and 15th.

Q. I can't hear you.

A. Between the 10th and 15th of August.

Q. The 10th of August?

A. Either between the 10th and the 15th. The day or date wasn't important to me at that time and I may have some memorandum on that somewhere.

Mr. Leonard Lyon: Will you read the answer?

(Answer read.)

Q. (By Mr. Leonard Lyon): Could it have been as early as the 10th of August?

A. It could. [860]

Q. You don't know? A. No, not exactly.

Q. Do you remember whether or not you had read the Silberman patent in suit before that meeting? A. I did.

Q. You had? A. Yes.

Q. Had you received a copy of that patent accompanied by a letter from Mr. Burkitt, Mr. Silberman's attorney, prior to the date of that meeting? A. No.

(Testimony of Philip Lipson.)

Q. Did you receive such a letter from Mr. Burkitt in August of 1948? A. No.

Q. I show you Mr. Burkitt's carbon copy—I show you from Mr. Burkitt's files his carbon copy of a letter dated August 12, 1948 addressed to Union Slide Fastener Company, Inc. Did you receive such a letter?

The Court: This will be marked Exhibit——

The Clerk: Plaintiff's Exhibit 15 for identification.

The Court: 15 for identification.

(The document referred to was marked Plaintiff's Exhibit 15 for identification.)

(Handing document to the witness.)

The Witness: No, I don't recall seeing such a letter [861] before.

Q. (By Mr. Leonard Lyon): Do you say you did not receive such a letter?

A. I say I did not receive such a letter.

(Document handed to the court.)

The Court: There isn't sufficient foundation yet laid to admit the letter.

Mr. Leonard Lyon: I will have Mr. Burkitt testify as to the letter, your Honor.

The Court: All right.

Q. (By Mr. Leonard Lyon): You testified, I believe, that before you made a deal with Mr. Loew to become interested in the Union Slide Fastener Company that you made an examination of their books. Is that correct?

A. I did not. An auditor was instructed——

(Testimony of Philip Lipson.)

Q. I can't hear you.

A. An auditor was instructed by me to do it. I personally did not examine the books.

Q. Did the auditor make you a report?

A. Yes, he did.

Q. And was that report in writing?

A. A report as to what?

Q. The auditor's report that he made to you after auditing the books of the Union Slide Fastener Company and before you made your deal with Mr. Loew. [862]

A. He set up a set of books and I saw the figures in that.

Q. Did he make you a written report?

A. No.

Q. As a result of his audit?

A. No. There were working papers that I saw which he discussed with me during the making of the audit and determining it.

Q. Now, did those figures reveal how long the business had been carried on?

A. Which business?

The Court: Loew's business. How long had he been carrying on his business?

The Witness: It dated back to somewhere in December, 1946.

Q. (By Mr. Leonard Lyon): And from that date up until June, 1947, had the company been producing zipper strings? A. No.

Q. They had not made any?

A. They had made some but not from the date

(Testimony of Philip Lipson.)

of December, 1946. They had made some at a later date.

Q. When did they begin manufacture?

A. They began manufacturing in March, 1947.

Q. And had that manufacture continued up until June, 1947? [863]

A. Yes.

Q. On what machine?

A. On the single-header machine.

Q. The Loew machine? A. Yes.

Q. Were there any other zipper machines in the possession of the Union Slide Fastener Company when you examined its affairs in June, 1947, except the one assembled Loew machine and the four non-assembled machines?

A. Well, the two single-header machines were there besides these others mentioned. [864]

Q. Were they Loew machines?

A. They were machines belonging to Loew?

Q. I mean, what design were those machines?

A. They were the type that Mr. Loew had a patent on.

Q. What?

A. They were the type described in Mr. Loew's patent.

Q. What became of those two machines?

A. They are still on the premises.

Q. Do you still use them? A. No.

Q. How long has it been since you used them?

A. Since June, 1947.

Q. Were there any double stringer machines there except the one that you say had just been

(Testimony of Philip Lipson.)

produced by Mr. Loew in June, 1947? A. No.

Q. What has become of that machine?

A. Which machine?

Q. The one that was assembled, the double stringer Loew machine that was assembled when you examined into the affairs of the concern in June, 1947.

A. It is still in operation.

Q. Were the other four machines that you have referred to that were not assembled in June, 1947, were they assembled and put into operation? [865]

A. They were assembled and put into operation at a later date.

Q. What date?

A. One of them I think was completed somewhere in October or November, 1947.

Q. What dates were the other three assembled and put in operation?

A. At later dates. I couldn't say offhand the exact dates.

Q. As nearly as you can tell us.

A. They were all assembled prior to June, 1948; somewhere between June, 1947 and June, 1948.

Q. Were any additional machines manufactured before June, 1948?

A. In addition to those five?

Q. Yes. A. No.

Q. When were any additional machines built or acquired by the Union Slide Fastener Company?

A. Mr. Loew started to build 10 machines when



(Testimony of Philip Lipson.)

I was in Europe, and that would be somewhere between May and July, 1948.

Q. How many? A. Ten.

Q. And were those machines completed? [866]

A. Yes, they were.

Q. What became of them?

A. Some were taken by Mr. Loew as part of his share in the business when the business—when he withdrew from it, five of them he took.

Q. He took five of them?

A. That is correct.

Q. And what became of the other five?

A. The other five were assembled, some of them are in use now, and a few were sold.

Q. When did you sell them?

A. Some were sold in 1949.

Q. How many?

A. I believe four of them.

Q. Four out of the five that you kept?

A. Four out of the five.

Q. Where were they sold? Where were the purchasers located? A. Mexico.

Q. In addition to those 10 machines, have you built any further machines? A. Yes.

Q. How many? A. Six more.

Q. That is all that has ever been built? [867]

A. That is correct.

Q. When did you build those six?

A. Those were built in 1950.

Q. Where are those machines?

A. Some of them are in use right now.

(Testimony of Philip Lipson.)

Q. How many?

A. We have all told eight double header machines in operation now.

Q. How many of the machines did you build in 1950? A. Six.

Q. And how many of those do you still have in operation in your plant?

A. I want to correct that. On recalling that, there were four built in 1950, not six. We built four in 1950; not six.

Q. Now, if I understand you correctly, the only machines, double stringer machines that have ever been built by the Union Slide Fastener Company were the five, one of which was assembled before you went there, and the other four were not, in 1947, then in 1948 Mr. Loew built 10 machines, five of which he took with him, and then there were five machines built in 1950—— A. Four.

Q. (Continuing) ——four machines built in 1950, and that is all the machines that were ever built by the Union [868] Slide Fastener Company, is that right? A. That is correct.

Q. How many machines do you have in operation—how many of these machines do you have in operation at the Union Slide Fastener Company now?

A. Eight chain machines, eight double header chain machines.

The Court: Of those four you built in 1950, how many of those did you sell and how many did you keep?

(Testimony of Philip Lipson.)

The Witness: None. Those are all on hand now.

The Court: According to my calculation, then, you have 10 machines now. I will show you how I arrived at it.

The Witness: Yes, I realize that, there is some testimony I haven't given because I wasn't asked about it. There were two machines sold to Canada to the former employer of Mr. Loew. According to his license with them, he was supposed to disclose to them any developments he made in the art of building machines, and one machine was shipped to them in February, 1948, and one machine was shipped to them in—no, it was two machines were shipped to them in the latter part of 1948, I believe it was October.

Mr. Leonard Lyon: If your Honor please, would you mind if I stood up here closer to the witness? I can't hear him back there.

The Court: That is all right. [869]

That makes three all together that were shipped?

The Witness: Three were shipped to Canada.

The Court: That still doesn't come out right. That would make you have seven machines on hand. See where I am wrong. I am talking about double header machines. One was the one that was already assembled when you went with Loew; four more were assembled later when you went with Loew, that makes five; Loew built 10 machines, five he took with him, four of the remaining five you sold to Mexico.

(Testimony of Philip Lipson.)

The Witness: Yes.

The Court: That leaves you one additional machine and that makes six.

The Witness: That leaves me six machines.

The Court: You built four in 1950. That makes 10 machines. You sent three to Canada, and you take 3 from 10 and that leaves 7. You should have seven on hand now.

The Witness: I am not sure of what I said about building in 1950. I said I built six and then I changed it to four. I am not sure. It may have been five. Outside of these sales that I stated here, there were no other double header machines sold, and the remaining ones are in operation.

Q. (By Mr. Leonard Lyon): How long has it been since you sold any machine?

A. Since 1949, the ones we sold to Mexico. [870]

Q. You say you bought out Mr. Loew. Was there a written agreement of purchase by you of his interest at that time? A. Yes.

Q. Can you produce that agreement?

A. Yes, I can.

Q. Will you do so? A. Yes.

Q. Have you it here in the court room?

A. No, I haven't. [871]

Q. Subsequent to the filing of this suit the Union Slide Fastener Company a corporation, filed an involuntary petition in bankruptcy in this court, did it not? A. No.

Q. You did not file a petition?

(Testimony of Philip Lipson.)

The Court: Filed a petition for reorganization, is that it?

The Witness: That is right.

Q. (By Mr. Leonard Lyon): Did you file a schedule of assets in that proceeding?

A. I did not. I do not recall the papers. All the papers were handled by my attorney. I didn't file anything personally so I can't answer the question.

Q. Do you know whether or not you listed as an asset any rights under the Silberman patent, any license or rights either from Mr. Silberman or from the plaintiff in this case?

A. We had listed in our statement——

Q. Can you answer that question?

A. As to what?

The Court: Read the question, Mr. Reporter.

(Question read.)

The Witness: Not specifically.

Q. (By Mr. Leonard Lyon): You did not?

A. Not specifically.

The Court: What do you mean by that? [872]

The Witness: We listed under the assets a value of \$25,000 covering research, development, patents and licenses and it was listed that way in general.

My attorney told me that in filing this as an asset that normally it isn't considered an asset because it is something that is only of value to an existing company, and whether they listed it as an asset or not I don't know, but it appears on our financial



(Testimony of Philip Lipson.)

statement \$25,000 research, development, patents and licenses.

The Court: But you didn't list Silberman's patent anywhere specifically in it?

The Witness: No.

The Court: Or any interest in it?

The Witness: No, we did not.

Q. (By Mr. Leonard Lyon): Now, pending these bankruptcy proceedings or reorganization proceedings, you had a fire at the Union Slide Fastener Company, did you not?

A. I don't know what you mean by "pending."

Q. While the proceedings were going on?

A. No.

Q. Did you have a fire at the Union Slide Fastener Company? A. Yes. [873]

Q. And did it destroy any of the records of the company?

A. It did some of the real old records.

Q. Did it destroy the sales records of Mr. Loew that existed before June, 1947, for the sale of fasteners? A. I don't believe so.

Q. You have still got those records?

A. I think so.

Q. And did it destroy your sales records of your sales since 1947? A. Some real old ones.

Q. What ones?

A. We filed away—when you say "sales records," do you mean the individual invoices or do you mean the records in the books?

Q. Both—I mean both.

(Testimony of Philip Lipson.)

A. In the books they were not destroyed because the books were kept in a safe, but the old invoices that we had—we had thousands and thousands of them, they were kept in a storage place and some of them may have been destroyed.

Q. Now, did the fire destroy any of these zipper machines? A. No; it damaged them.

Q. You testified that at the meeting with Mr. Silberman there was an argument or some discussion and some [874] accusation that Mr. Loew had bribed away an employee of Mr. Silberman.

Do you remember the name of that man?

A. Yes.

Q. What was his name?

A. Morry Waldman.

Q. Is he working for you at the present time?

A. (No answer.)

The Court: How do you spell the name Waldman?

The Witness: W-a-l-d-m-a-n.

Q. (By Mr. Leonard Lyon): Was he working for you? A. No.

Q. Has he worked for you?

A. He started to work for me in August of 1950 and terminated his employment with me sometime in 1953.

Q. In your deposition at page 60 you testified as follows:

“Q. Did Mr. Waldman ever tell you what if any part he had in the building of the first chain machines at Union Slide Fastener?

(Testimony of Philip Lipson.)

"A. Well, he told me recently, since I employed him, that he helped Mr. Loew build the machine."

The Court: On what page?

Mr. Leonard Lyon: Page 60 at the bottom of the page. [875]

Q. (By Mr. Leonard Lyon): You know, do you not, that Mr. Waldman was associated with Mr. Silberman at the time Mr. Silberman was designing the machine shown in the Silberman patent in suit?

A. I only know what Mr. Waldman told me and I was under the impression that that is hearsay.

Q. Well, did he tell you so?

A. He did tell me that he was working for Mr. Silberman at the time when they were building the machines.

Q. And how did Mr.—under what circumstances did Mr. Waldman make that statement to you?

A. He came to me to apply for a job while I was at the hospital. I had a case of sciatica and he appealed to me——

Q. And what did——

A. You want me to answer the question? You want to know the circumstances.

The Court: Yes.

Q. (By Mr. Leonard Lyon): Just what did Mr. Waldman say to you when he told you that he had helped Mr. Loew design the Loew machine?

A. Well, that is what I was trying to bring out.

Q. You were talking about the fact that he told you he had worked with Mr. Silberman. Now, I

(Testimony of Philip Lipson.)

want to know just as near as you can tell me just what he said to you when he told you that he worked with Mr. Loew when Mr. Loew was [876] designing the Loew machine.

A. Mr. Waldman didn't sit down and tell me the whole story at one time.

At various conversations he told me a little bit now and a little bit then and I gathered from the whole what he did. So, if you want me to make a statement as to what he said at one particular moment I can't do it.

Q. Did he tell you whether or not he worked on the Loew machine before or after he worked on the Silberman machine?

A. Oh, after he worked on the Silberman machine.

The Court: Just a minute. When did you say Waldman worked for you? What dates of what year?

The Witness: August of 1950.

The Court: To sometime in 1953?

The Witness: That is right.

Q. (By Mr. Leonard Lyon): Wasn't Mr. Waldman working for the Union Slide Fastener Company when you went there in June 1947?

A. No.

Q. Did he work there at any time from the time you became associated with the Union Slide Fastener Company in June 1947 up to this visit with you in the hospital that you have told us about?

(Testimony of Philip Lipson.)

A. When you say he worked, do you mean that he was [877] employed?

Q. Well, answer that first.

A. He was not employed by the Union Slide Fastener Company since I came in in June 1947 until I hired him in 1950.

Q. Was he on the premises?

A. He was once on the premises.

Q. What was he doing there?

A. Mr. Loew called him because he could not operate the machine and he called Mr. Waldman in to help him make it operate.

Q. When was that?

A. It was sometime, I would say, about 10 days or two weeks after I joined the corporation.

Q. Now, going back to this accusation that Mr. Silberman made at the meeting in the Hollywood-Roosevelt Hotel in August 1948, who did he accuse of having bribed Mr. Waldman away from him or Mr. Loew—you or Mr. Loew? A. Mr. Loew.

Q. You have referred to the difference between a square shoulder zipper and a round shoulder zipper. Were square shoulder zippers on the market—that is being manufactured and sold, prior to your first knowledge of the Loew patent, Exhibit O or the Loew machine? A. Yes, sir. [878]

Q. They were an old item in the zipper business, were they not?

A. I wouldn't know whether they were old or not. I wasn't acquainted with zippers much prior to that date.



(Testimony of Philip Lipson.)

Q. Well, you do not contend that the first machine that would make square shoulder zippers was the Loew machine, do you?

A. No, I didn't contend that. I knew that the Sundback had the square shoulder zipper.

Q. That is to say Sundback patent 1,331,884, Exhibit E in this case, described a manufacture of a square-shouldered zipper, does it not?

A. That is correct.

Q. And so does Sundback patent 1,467,015, Exhibit 13 in this case?

A. I wouldn't know by the various numbers unless I saw the patent. I know there was a Sundback method but whether it was one patent or the other I wouldn't know without looking at them.

Q. Are you familiar with the Loew patent, Exhibit O, No. 2,444,706 (handing document to the witness)?

A. Yes, I am.

Q. Does that patent describe an operative machine for making zippers?

A. It doesn't show all the detail but it shows some of them. [879]

Q. Well, insofar as there is a description of a machine there, would a machine, built in accordance with that description, be operative?

A. I believe I testified before that there was one operative at our place.

Q. A practical machine?

A. Yes.

Q. The machine was operative and practical without the improvements that you have referred to that you added to it, is that correct?

(Testimony of Philip Lipson.)

A. I didn't add to this type of a machine that was a single header which is pictured on here.

Q. What is the difference between a double header and a single header, except one is a double unit of the other?

A. There are other differences in the operation of the machine.

Q. What are those?

A. Well, there are very many to enumerate. For one, the manner of feeding the material.

Q. Don't you have two feeds on a double string machine?

A. We call it a feeding mechanism. It may feed two, it may feed one, it may feed a multiplication of more strips than one.

Q. When did you first see the assembled Loew machine which you have referred to as being in existence at Union [880] Slide Company when you went there in June of 1948, when did you first see that machine operate?

A. I visited the Loew plant as a friend of his some time in April or May 1947.

Q. Was he operating that machine then?

A. Yes, sir, he showed me that he operated the machine.

Q. Was it producing zipper strings?

A. As much as I knew about zippers there, it looked to me like it was producing.

Q. Would you say that on that occasion it was an operative machine? A. I would say so.

Q. A practical machine?

(Testimony of Philip Lipson.)

A. At that time I wasn't a judge of zipper machines to be able to tell you.

Q. Well, you know a lot about it now, and you can remember what you saw then; would you say now that it was a practical machine as you observed it then?

A. I observed that it was manufacturing zippers. Whether it was practical depends on its efficiency, on how often it had to be fixed.

Q. I don't care for all the detail of what makes it practical; I am just asking you for your opinion. Was it practical? [881]

A. From an observation of 10 or 15 minutes, it would be difficult for one to make a statement whether a machine was practical or not.

The Court: Let me ask you this. We are talking about a single header, so-called Loew machine.

The Witness: Yes.

The Court: Similar to Loew patent Exhibit O. Did you ever look that machine over?

The Witness: Never took it apart. The machine is cumbersome, it is standing in our place as junk.

The Court: You don't know how it operates, then?

The Witness: I wouldn't be able to operate it, unless I studied it.

The Court: Did you ever notice whether it has knurled rollers to feed in the tape or the wire, or whether it has a different mechanism?

The Witness: It has a knurled roller, one, be-

(Testimony of Philip Lipson.)

cause that machine operated on a single stringer. It had a knurled roller to feed the tape.

The Court: I am not talking about the tape. Does it have a knurled roller to intermittently move the wire?

The Witness: No, it did not.

The Court: Do you know whether it used a reciprocating finger?

The Witness: That's right. [882]

The Court: That touched the cavity and pushed it forward?

The Witness: That is the one right here (indicating).

Q. (By Mr. Leonard Lyon): In your opinion, was that machine built in accordance with the Loew patent, Exhibit O, a copy of which you have in your hand?

A. From the observation of that machine that I have seen, it was.

Q. How many operations of the ram in that machine were there between forming and attaching of the zipper element?

A. From what I recall, nine.

Q. How many are described in the Loew patent, Exhibit O? A. 15.

Q. Will you examine it again and see if there are not, in fact, 27 reciprocations of the ram in the Loew patent, from the beginning of the forming of the zipper element and through its trimming?

A. There are either 14 or 15, because one of them it blocked out here by a part, and unless I

(Testimony of Philip Lipson.)

measure it, it seems to me there isn't any room for any other ones. There isn't, certainly, room for one in there. But it seems like I count 14 again.

Q. Will you look at column 3, line 62, of the Loew patent, Exhibit O, and tell me how many operations of the ram [883] it states?

A. Did you say column 3 or page 3?

Q. Column 3. Is there not a column at the top?

The Court: Now, wait. I have lent him the original patent. Does someone else have another copy of the patent to Loew?

What column are you referring to?

Mr. Leonard Lyon: Column 3. That is on the second page. Line 62. The language reads: "After the wire has fed forward 27 times, it is now in a position for the notching dies to function."

Q. (By Mr. Leonard Lyon): Each one of those steps forward of the wire is accompanied by an operation of the ram, is it not, as described in the Loew patent? A. Yes.

Q. Then there are some 27 operations of the ram involved, as described there, instead of 15 as stated by you, is that correct? A. Yes.

Q. And then the patent describes six more steps before the clamping and trimming on the tape is completed, isn't that right?

A. I didn't see. On what line is that? Are you speaking about the figure here? On this figure I can see 14 steps.

Q. I am talking about the description of that apparatus [884] as it is set forth in the patent.



(Testimony of Philip Lipson.)

A. I have to refer to it. I didn't read that far.

Q. Will you do that?

A. That was line——

Q. You have stated you don't know where to look for the finishing operations? A. Yes.

Q. Look at the paragraph commencing at line 47 at the bottom of column 2, and continuing over to the next page.

A. Will counsel please tell me whereabouts I can find it? I have so far read over to page 3.

Q. You haven't been able to tell how many strokes of the ram, in addition to the 27 previously specified, are required to finish and trim the zipper element?

A. From line 47 on page 2 up to where I read now, line 20 in column 3, I haven't found it yet.

Q. Maybe you can tell us from the drawing. Look at Fig. 1 of the drawing of the Loew patent Exhibit O. Do you notice about one-third the distance on the right-hand side of that drawing some drawing lines indicating a blank space between two parallel dotted lines? A. Yes.

Q. What does that indicate?

A. That indicates a line where the wire is full without notches, and right after that line we find the zig-zag [885] dotted lines which show notches.

Q. What does the space between those two lines indicate, blank space?

A. The space between the two lines—which do you mean? The space between these two blanks?

Q. Yes.

(Testimony of Philip Lipson.)

A. It could be that it is broken in the middle, because there is no space to show the entire length of the strip on the page.

Q. Do you know what it means?

A. Well, in drawing we use either this form or a different form of indicating a space in between.

Q. Doesn't that indicate that there is some undisclosed operations occurring or structure occurring between those two lines?

A. It may indicate just a blank strip of wire, or it may indicate anything else. I couldn't tell from this drawing what it means to indicate.

Q. Is it your testimony that your double string machines that you manufactured at Union Slide, or that were manufactured by Mr. Loew at Union Slide, use the machine described and shown in this Loew patent, Exhibit O?

A. Use it in what way? The identical way?

Q. Is your machine, your double string machine, the machine described in this Loew patent?

A. The machine — no, it is not identical with that.

Q. Have you ever attempted to check the elements called for in the claims of this Loew patent, Exhibit O, against your double string machine, to see if those elements are present in that machine?

A. Yes, I have.

Q. Did you find them all there, or are some of them missing?

A. As far as from what I can recall, I have found most of them in there.

(Testimony of Philip Lipson.)

Q. Do you find some of them missing?

A. As to what—method, or size, or number of strokes?

Q. Let's take claim 1 of the patent, this Loew patent, have you checked the elements of that claim against your double string machine?

Mr. Mockabee: Your Honor, I object to this line of questioning. The witness has not been in any way qualified as a patent expert or capable of interpreting a patent claim.

The Court: He has been qualified as a mechanic and a tool maker, and he might have trouble with legal phraseology, but he wouldn't have any trouble with drawings, or even a description, except the possible language there.

Mr. Mockabee: Mr. Lyon has asked him to refer to claims and interpret those, and I don't think there is any basis for that. [887]

The Court: He has asked him whether within the claims of the Loew patent he finds elements to exist—to compare the claims of the Loew patent. To a certain extent that is proper. We will see how far it goes.

The objection is overruled.

The Witness: Claim 1?

Q. (By Mr. Leonard Lyon): Yes. Have you checked the elements of that claim to see if each and every one of them is present in the double string machine of the type that you manufactured?

The Court: That may not be proper. Let's take claim 1. It starts out, "An automatic machine for

(Testimony of Philip Lipson.)

manufacture of slide fastener strings in combination with a press”—now, is that part similar to defendant’s machines?

The Witness: That’s right.

Mr. Leonard Lyon: Double headers?

The Witness: Yes.

The Court: Next it says, “comprising an upper die block which is attached to the pitman of the press”; do you have that in your machines?

The Witness: I don’t know what the technical word “pitman” is. [888]

The Court: What does pitman mean? Something like a connecting rod?

Mr. Doble: It means a connecting rod. It is an old-fashioned term for a connecting rod.

The Court: Then let us assume “pitman” means a connecting rod.

Do you have an upper die block which is attached to the connecting rod of the press—the pitman of the press? Do you have that?

The Witness: Yes.

The Court: Do you have a lower die block which is fixed to the table of the press?

The Witness: Yes.

The Court: Do you have a series of upper and lower dies or punches for successively drawing an embryo cavity?

The Witness: Yes.

The Court: I take it that means the beginning of a recession?

The Witness: Yes, sir.

(Testimony of Philip Lipson.)

The Court: Do you have that?

The Witness: Yes, sir.

The Court: Serrating the edges?

The Witness: Yes, sir.

The Court: Do you have a die on your machine that serrates or cuts an irregular edge? [889]

The Witness: It does. It notches—it notches what we call the notches.

The Court: And punching off individual elements from a stock wire?

The Witness: Yes.

The Court: Means for clamping said element to standard tape?

The Witness: Yes, sir.

The Court: And means for feeding said wire stock. Now, we come down to and this is a rather long one. "Means of feeding said wire stock to the successive stages in the operation."

Generally, do you have a means in your machine for feeding the wire stock to the successive stages in the operation?

The Witness: Yes, sir.

The Court: Now, they tell us what these means are: "Comprise a sliding section which is part of the lower die block."

The Witness: No, that we don't have.

The Court: The next:

"A reciprocating finger which pushes the wire stock by engaging the embryo cavity."

The Witness: No, we don't have that.



(Testimony of Philip Lipson.)

The Court: "And which is part of said sliding section."

The Witness: We don't have that. [890]

The Court: And you don't have the spring and the various devices that work with this reciprocating finger?

The Witness: No.

The Court: Well, I think all the rest of the claim is devoted to the means involving the reciprocating finger.

Mr. Leonard Lyon: That is right. If that is out—if those are out I think everything that follows is out.

Q. (By Mr. Leonard Lyon): Will you look at Figure 1 of the patent, the Loew patent, Exhibit O, and find the punch member tooth 21. Have you found that? A. Yes.

Q. Just what part of that punch member 21 and Figure 1 severs the element—the fastener element?

A. It isn't disclosed here.

The Court: Well, wouldn't Figure 23 point to the cutting edge that does the severing?

The Witness: No, that does the notching.

The Court: It does the notching, yes.

The Witness: It shows the form in front but it doesn't show that.

Q. (By Mr. Leonard Lyon): Does Figure 1 show where the severing takes place?

A. It doesn't indicate. I think line 25 is the one that shows where it is being severed.

Q. Isn't it a fact that Loew shows the old type

(Testimony of Philip Lipson.)

tool [891] holder where a side set screw holds the separate punches in the block?

A. What do you mean? On this drawing?

Q. Yes.

A. I couldn't tell you from that drawing. It doesn't show a full apparatus. It only shows individual members.

Q. In the Silberman patent in suit the punches are face to face—that is, the forming and shearing punches, is that not correct?

A. Just what do you mean by the forming and shearing punch?

Q. The punches that form the projections and depressions and the shearing or cutting off of the metal.

A. The question was whether——

Q. Are they not face to face? A. No.

Q. How are they—are they adjacent to each other?

A. Yes, they are adjacent to each other.

Q. And is that shown in the Loew patent?

A. The shearing punch here isn't shown at all. It is just part of it showing.

Q. Is that true of your double string machines, that those members are adjacent to each other?

A. Of the double string machine? Yes.

The Court: Let me ask this to save time. Is there [892] anything in the Loew patent which describes who makes any claim for this round shoulder zipper that results?

A. (No answer.)

The Court: It will be conceded, however, will it

(Testimony of Philip Lipson.)

not, that the diagram, Figure 1, clearly demonstrates how the square shoulder zippers would result?

Mr. Lyon: Is that true, Mr. Doble?

Mr. Doble: Yes, that is true.

The Court: All right.

The Witness: Your Honor, may I explain something that just came to my notice on this drawing?

The Court: Yes.

The Witness: The drawing in Figure A as shown here——

The Court: Figure 1.

The Witness: Figure 1 is shown as a separation in that the back part of it, the one to the left, is the lower part—the die part of it and the front part shows the upper part of it and therefore he does not show a punch here at all. He merely shows the strip here.

Whether this is an extension of one piece of wire or not it could also mean that it is a break here—that the front part here shows the upper part of the strip and the other one shows the rest of the strip in relation to the die.

Q. (By Mr. Leonard Lyon): How about the die No. 19? Is the strip not supported on that die?

A. No. 19 in figure 1?

Q. Yes.

A. This particularly doesn't show support. 19 is a notching punch—one of the two notching punches.

Q. Can you answer with reference to either of

(Testimony of Philip Lipson.)

the other figures? A. Which figures?

Q. Either Figure 2, 3 or 4. The question is, is the strip not supported on that die 19?

A. Well, your statement is that die 19 is a die. From the way I look at it 19 is a notch—one of the two notching dies but not the whole die.

From this figure I can't see whether it rests on it or just shows the outline where it is being punched through.

Q. Look at Figure 2. Can't you answer the question from that? A. Figure 2?

Q. Yes.

A. Figure 2 shows a strip indicated with a solid line at the left hand with a No. 3, and a continuation of it towards the right side in dotted lines and that evidently is meant by the strip of metal.

Q. I think, your Honor, that in the interest of time I am not going to pursue this examination.

I have established—indicated my point and I can cover [894] it in argument just as well.

The Court: I will tell you what I think about it. I don't see anything in Loew except two things. I think that Loew very clearly describes a type or style of punch which would cut a certain type of notch which would result in a square shoulder zipper and I think Loew also shows a reciprocating finger for moving the strip rather than a narrow wheel.

Now, there is one claim of Loew where he talks about a narrow wheel for the tape. I think it is Claim 5. But that is old in the art.

(Testimony of Philip Lipson.)

So, I would conclude that anybody that could take the teaching of Loew could take one step out of Loew's patent, namely, he could take the type of notching that exists in Loew's patent and use it without infringement, unless he infringed in some other manner.

Mr. Leonard Lyon: That is all the cross examination I have, your Honor.

### Redirect Examination

Mr. Mockabee: Regarding this Loew patent. I think the disclosure can be readily understood.

First we read the brief description of Figure 1 on page 2, column 1, line 25.

The Court: What are you going to contend for Loew? What do you find in Loew? [895]

Mr. Mockabee: I am not contending anything. There seems to be a lot of confusion about what it shows—an attempt to indicate that Loew shows a series of operations performed over a great length rather than close together and at the point where they are joined to the tape.

Figure 1 doesn't disclose any such thing.

The Court: What part do you want me to look at?

Mr. Mockabee: Page 1, column 1, line 25 and Figure 1. That shows a plan of the more important stages of operation and the discussion on the next figure immediately following, Figure 2, shows an elevation of the main part of the machine.

Now, referring to Figures 1 and 2 you will note No. 19—I mean, pardon me, punches 21 and 24. No. 21 is shown as well in Figure 1.



(Testimony of Philip Lipson.)

The Court: I don't find 21. Oh, yes, I have it. I find 21 and what was the other, 24?

Mr. Mockabee: It is a punch assembly, 21 and 24.

Then in Figure 2 there is a cam member attached to the head No. 34 which is stated in the specification at column 3 on the second page of the text, line 6:

"On the downward stroke of the die 1 the cams 34 compress hammers 32 and 33."

Now, if we refer to the cam member 34 in Figure 2 and see that it engages the cams or hammers 32 and 33 in Figure 1, it would indicate from a showing of the machine in Figure 2 that the notching punches are immediately adjacent to the [896] jaw closing members, and this discussion about what operations occur between the broken lines of Figure 1 is purely speculative when the specification shows the relationship of the elements.

The Court: Does Loew show in his description where the severing takes place?

Mr. Mockabee: I haven't got that marked, your Honor.

The Court: Well, why I asked——

Mr. Mockabee: Cutting die 21.

The Court: What is that?

Mr. Mockabee: It says in column 2, line 14——

The Court: What page?

Mr. Mockabee: This is the first page.

"The die 21 is also provided with a semi-circular cutting edge for the purpose of cutting out a semi-circular section as shown at 25."

(Testimony of Philip Lipson.)

25 being indicated in Figure 1 as the end element in the series.

You will note in Figure 1 the lead line 25 goes to a full line whereas the arcuate similar line to the left of that is a dotted line indicating the cut has not yet been made at that point.

The Court: All right.

Q. (By Mr. Mockabee): Mr. Lipson, on cross examination there was brought out a reference to a fire at your plant. [897] Will you explain what caused the fire?

A. The cause of the fire was never determined accurately.

Q. The occasion of the fire?

A. The occasion of the fire?

Q. Let me put it this way.

A. Just what do you mean by "occasion"?

Q. Did anything else occur at the time of the fire?

A. Well, you are referring to a fire at what date?

Q. There was only one fire referred to in the testimony.

A. No; our plant suffered a fire loss on October 2nd, 1949 at an occasion where the place was broken into.

Our factory had safeguards against breaking and entering including a burglar alarm system, but someone had cut a hole in the roof and entered then at approximately prior to 4:30 a.m. on the night of October 2nd and ransacked our office.

(Testimony of Philip Lipson.)

They didn't take very much out in the way of money because all we had was approximately \$30 in petty cash and some stamps.

They dumped out all the contents of our safe. They opened that up and dumped it out on the floor.

They broke a lock on one of our drawing cabinets—I mean on our cabinet where we kept our blueprints and drawings and over half of our drawings and blueprints were missing and the place was set on fire. [898]

Q. Did those drawings relate, or any of them, relate to items which you had developed as improvements on your zipper manufacturing machinery?

A. Yes.

The Court: Did you have another fire?

The Witness: Yes, your Honor.

The Court: When did you have the other fire?

The Witness: The other fire happened a year ago, February 15th, at our new place.

The Court: 1954?

The Witness: 1954.

The Court: Was the place again broken into?

The Witness: No, there was no evidence of that this time.

The Court: Cause unknown?

The Witness: Cause unknown. Apparently from spontaneous combustion.

The Court: All right.

Would you like to take the recess now to look over what you want to cover on redirect?

(Testimony of Philip Lipson.)

Mr. Mockabee: Yes, I just want to collect my wits a little bit.

The Court: Maybe if we take our recess now you will do it more expeditiously.

(Recess taken.) [899]

Q. (By Mr. Mockabee): Mr. Lipson, do you have a copy of the Loew patent '706 before you?

A. Yes.

Q. Referring to Fig. 2 and the punch 6, and the punch assembly 21-24, does that in your opinion illustrate the spacing of 27 elements?

A. The distance shown in Fig. 2 of the Loew patent '706 between punch 6 and punch 21-24 does not show enough space for 27 stations.

Q. Do you think it would require any great ingenuity to move the punch 6 over closer to punch 24?

A. No.

Q. From your experience in making and reading mechanical drawings, is the drawing in the Loew patent, which you would consider a mechanical drawing, of the shop drawing type from which machines or machine parts are made?

A. No.

Q. A moment ago there was reference to the loss of drawings showing improvements you made on your double header machines, that loss being due to a fire which occurred at the time your factory was broken into. Will you tell me when the improvements of those burned drawings were made, approximately?

A. They were made between March 3rd and the

(Testimony of Philip Lipson.)

end of August 1949. They were completed in August 1949. [900]

Q. Did they constitute major improvements on the machine? A. Yes.

The Court: Which were made between those dates—the improvements or the drawings?

The Witness: The improvements and the drawings.

Q. (By Mr. Mockabee): I hand you Defendant's Exhibit AT, a forming and shearing punch and a two-piece punch removed from Plaintiff's Exhibit 5—it has no subnumber, your Honor.

The Court: We can give it one.

The Clerk: The last one was 5-C, so this will be 5-D.

The Court: 5-D.

(The exhibit referred to was marked as Plaintiff's Exhibit 5-D for identification.)

Q. (By Mr. Mockabee) (Continuing): —5-D, and ask you if you will compare their functional structure.

Mr. Leonard Lyon: If your Honor please, I don't believe this is redirect. I don't remember asking anything about those punches on cross examination.

Mr. Mockabee: Your Honor, I believe I asked permission to recall the witness.

The Court: He had reserved the right at the time he concluded his direct. Go ahead.

The Witness: What was the question?

(The question was read by the reporter.)



(Testimony of Philip Lipson.)

Mr. Mockabee: AT is the punch identified as the Union Slide Fastener punch.

The Witness: Yes, I have examined them.

The Court: He said compare their function.

The Witness: I can compare their functions. There is a slight difference in the fact that this is a punch for a larger size zipper——

Q. (By Mr. Mockabee): Please identify which is “this.”

The Court: 5-D.

The Witness: 5-D is for a No. 5 zipper, which is larger in size, and AT is a punch for No. 3 zippers, which are smaller in size.

The punch 5-D has a semi-circular channel in the front which is used for shearing off the head of the element, of the member. On the sides of the punch there are two channels ending with a triangular shape, which are used for notching the sides of the zipper scoop, which formed the lower half of the zipper scoop and the base of the zipper scoop. Immediately behind a short space from the circular channel I find a little square or oblong channel with rectangular sides, which I used for the projection of the succeeding elements so it isn't deformed by the punch coming down. In other words, they are clearance for the succeeding—for the projection of the succeeding element. [902]

Now, on Plaintiff's Exhibit AT I find in the front a semi-circular channel for the shearing off of the head of the zipper scoop.

On the side of the punch there are two rectangu-

(Testimony of Philip Lipson.)

lar-shaped channels ending in a triangular apex which are for forming the notches on the sides of the elements or zipper scoops, which form the lower half of the sides of the zipper scoops and the base of it.

I find on the back of it a rectangular channel leading all the way, at an angle, all the way to the back of the punch which is designed to clear the projection of the succeeding zipper scoops so in shearing off the front one the projection of the succeeding one isn't mashed.

The distance between the base of the semi-circular channel at the surface of the shearing punch to the channel for clearance of the projection of the zipper scoop is approximately fifteen-thousandths for the No. 3 zipper element.

The Court: Is it broader at the top—is the channel you are talking about broader on one side than the other? I am speaking of the diagonal channel you just mentioned.

The Witness: This one is broader for a No. 5.

The Court: Broader at the top, at the surface of the metal and deeper in the metal?

The Witness: No, it is a straight line. It is the [903] same width all over.

The Court: All right.

The Witness: In Exhibit 5-D we find a channel which divides the shearing punch forming four legs which are designed to keep the punch in constant contact with the dies. We call them guiding legs. The metal strip goes through this channel when the

(Testimony of Philip Lipson.)

punch is raised and is engaged by the shearing surface of the punch cutting out a semi-circular form on the head of the zipper scoop as well as the triangular notches for the formation of the legs.

On Exhibit AT I find the very same thing. Four legs designed as guides for the zipper strip.

Q. (By Mr. Mockabee): Would you say then except for the fact that Exhibit AS—pardon me, Exhibit 5-D is formed in two pieces that the structures of the punches are generally the same or not?

A. They are.

Q. Where did you secure the information from which you designed your punch, Exhibit AT?

A. Exhibit AT has the identical dimensions as the punch which was used in the Loew single-header machine.

Q. I hand you another punch, Defendant's Exhibit AS and ask you if you can identify that type of punch?

A. This is a punch which in appearance and function is identical with the punch shown on the Silberman patent. [904] I don't have a copy of it here.

Q. '793?

A. '793. I don't remember the figure of it.

The Court: Where did Exhibit AS come from?

The Witness: I received this punch when I purchased certain equipment from California Slide Fastener, not including double-header machines. He had some extra punches. Some were used up and

(Testimony of Philip Lipson.)

he gave them to me and this is one of the punches.

Q. (By Mr. Mockabee): And that punch does not show any means for forming notches?

A. No, it does not.

Q. Does the Union Slide Fastener punch, Exhibit AT and also the two-piece punch Exhibit 5-D, contain any other features which are not shown in the type of punch shown in the Silberman patent, Exhibit AS?

A. The type of punch shown in Exhibit AS is narrower in dimensions as to the channel for the strip to be used.

In my estimation the channel is made to clear a wire that is one hundred-thousandths in width.

The Court: One one-hundred-thousandth?

The Witness: No, .100. Which is a wire designed to be used in a No. 3 zipper without notching for what we call a round shoulder element.

The punch, Exhibit AT, which is a punch used by the [905] accused machine, this channel has a provision for wire which is .120 wide for notching out to form the square shoulder element. [906]

The punch No. 5-D, which was taken out of Exhibit 5 machine, is for a No. 5 zipper.

Q. Mr. Lipson, they are for different size zippers, but their functional elements can be compared?

A. Yes, they are identical with Exhibit AT.

The Court: It seems to me this all sounds familiar. It seems to me we have been over this before.

Mr. Mockabee: I don't know that we had that

(Testimony of Philip Lipson.)

comparison from our witness with regard to the punches.

Q. (By Mr. Mockabee): Going to another subject, Mr. Lipson. Do you have any personal knowledge as to the time of filing the counterclaim in this action of any events which transpired prior to its filing? A. Yes.

Q. From your knowledge was it prepared any considerable length of time before it was filed?

Mr. Leonard Lyon: I object to that. That is not rebuttal — or redirect examination, I mean, your Honor.

The Court: What do you propose to show?

Mr. Mockabee: There has been intimation, your Honor, that defendant was offered a settlement, and that defendant flatly refused, except on the basis of a substantial payment by plaintiff to defendant.

The Court: I am going to ignore all that. I am not going to consider your offer of that. Some talk of that cropped [907] into the record of this case, and it has no business here.

Mr. Mockabee: There are some events relating to that which have to do with the time of filing the counterclaim, and regarding which time plaintiff is attempting to set up some sort of a statutory bar.

The Court: Even if negotiations for a settlement were pending, and if one party let the statute of limitations run, he couldn't excuse himself by saying he was negotiating for a settlement.

Mr. Mockabee: I thought it might be relevant



(Testimony of Philip Lipson.)

in view of the fact that it has come into the case previously.

The Court: If that is what you propose to prove, the objection will be sustained.

Q. (By Mr. Mockabee): Mr. Lipson, I hand you a letter addressed to you, dated February 4, 1952, bearing the signature Sigmund Loew; would you please read that letter into the record?

Mr. Leonard Lyon: Let me see it first, please.

The Court: Have you seen it, counsel?

Mr. Mockabee: No, he hasn't.

The Court: It will be Exhibit BE, for identification.

(The document referred to was marked Defendant's Exhibit BE for identification.)

Mr. Leonard Lyon: I object to this as hearsay.

The Court: It wouldn't be read into the record. [908] You can offer it as an exhibit and I will rule upon it.

Did you receive this letter, Mr. Lipson?

The Court: From Mr. Loew?

The Witness: Yes.

The Court: This is his signature?

The Witness: Yes.

The Court: Let me read it.

Mr. Leonard Lyon: It is a statement out of court, your Honor. I don't believe it was shown to Mr. Loew on the taking of his deposition. We have no opportunity to cross examine Mr. Loew on it. He has testified in the case, and a letter written by him to this witness, not communicated to the plain-

(Testimony of Philip Lipson.)

tiff, and with which he was not confronted at the time of his deposition, is not admissible, I don't believe.

Mr. Mockabee: In the Loew deposition, page 30, line 16, beginning at line 13 is a question concerning certain demands made upon Loew, as to what he should be required to do to effect a settlement of the controversy between Loew and Lipson over the Slide Fastener Company. The answer at line 16 by Mr. Loew was that Mr. Lipson asked Loew to give him a statement regarding the meeting with Silberman. The following question refers to the letter of February 4, 1952:

"Was it written as a part of the settlement?"

And the answer was, "Yes, it was at that time."

The Court: Does the deposition show elsewhere that at the time this letter was used to refresh Mr. Loew's recollection it was exhibited to him?

Mr. Mockabee: I don't believe it does, your Honor.

The Court: I will take the objection to the introduction of BE under submission, and I will look into it tonight.

Mr. Mockabee: As far as I know, that is the only reference to it.

Do you have any further questions of Mr. Lipson?

Mr. Leonard Lyon: No, I have no further questions.

Mr. Mockabee: Okay. Step down.

The Court: All right. Step down.

Is that defendant's case?

Mr. Mockabee: No, sir. I want to introduce some more prior art.

I wish to offer as Defendant's Exhibit BF a soft copy of patent to Sundback '857, issued in 1922, with reference to Fig. 4——

The Court: Where is the patent?

The Clerk: Here it is.

Mr. Mockabee: Which shows the general tool grouping relative to the tape, and in Fig. 26, I do not have the sheet number, your Honor——

The Court: Maybe I can find it. Fig. 26, sheet 13.

Mr. Mockabee: The method of forming zipper elements and [910] applying them, particularly in conjunction with the disclosure in Smith patent Exhibit G.

I wish to offer a copy of Wintriss——

The Court: Exhibit BF will be received in evidence.

(The document referred to was received in evidence and marked as Defendant's Exhibit BF.)

Mr. Mockabee: I wish to offer a copy of Wintriss '662, to generally show the state of the art at the time of its issue.

The Court: That will be Exhibit BG, received in evidence.

(The document referred to was received in evidence and marked as Defendant's Exhibit BG.)

Mr. Mockabee: I wish to offer a copy of——

The Court: It was issued on December 14, 1943. All right.

Mr. Mockabee: I wish to offer a copy of Ulrich patent '380.

The Court: It will be received as BH, received in evidence.

(The document referred to was received in evidence and marked as Defendant's Exhibit BH.)

Mr. Mockabee: With reference to the showing of the punch assembly and closing jaws in Fig. 2 of that patent.

The Court: Let me see it. In Fig. 2 of Ulrich?

Mr. Mockabee: Yes, sir. [911]

The Court: I can't see any in there. Are you sure you have got the right figure? Do you want to look at it here?

Mr. Mockabee: Let me see it. I don't have a copy, your Honor.

It is Fig. 12, your Honor. I beg your pardon. Figs. 11 and 12.

The Court: All right.

Mr. Mockabee: I wish to offer a copy of Poux patent '176.

The Court: That will be Exhibit BI, received in evidence.

(The document referred to was received in evidence and marked as Defendant's Exhibit BI.)

Mr. Mockabee: I wish to refer to claims 3, 5, and 6 thereof.

The Court: You have got two soft copies here of BI; which one do you want to use?

Mr. Mockabee: I think this is a cleaner one, your Honor.

The Court: Let's have the cleaner one.

Mr. Leonard Lyon: In this offering of the prior art by defendant's counsel, your Honor, it will help us a great deal if defendant's counsel would indicate in respect to the different exhibits whether he is urging them against Poux or as against Silberman, or as against both patents.

We find difficulty in that connection in knowing what they are offered for. [912]

Mr. Mockabee: Your Honor, I would have gone into more discussion of them, but I was more or less gagged when I first started to enter the prior art. I can't right at the moment give you that. I would be glad to give you a memo on it, but you will find in practically all cases the dates of the patents more or less speak for themselves.

The Court: Supposing you overnight try to give us some list as to whether the prior art offered today, or previously, applies to Poux or Silberman, make a little chart on it, if you will.

Mr. Mockabee: Yes. [913]

The Court: What is next?

Mr. Mockabee: I wish to enter a copy of Behrens '783.

The Court: That will be Exhibit BJ in evidence.

(The document referred to, marked Defendant's Exhibit BJ, was received in evidence.)



Mr. Mockabee: And refer to the description on page 2, column 2, lines 64 through 68.

The Court: Let me look at them.

Mr. Mockabee: I don't believe that the file histories of the two patents in suit have been entered and inasmuch as I am barred from any discussion of them I will enter them for the court's consideration.

The Court: You won't be barred from discussing them in argument.

Mr. Mockabee: I mean at this time.

The Court: Do you have the file wrappers here?

Mr. Mockabee: Yes, right here, your Honor.

The Court: The file wrapper?

Mr. Charles Lyon: They are the file history and we had a stipulation regarding them.

Mr. Leonard Lyon: May I take a look at them?

(Document handed to Mr. Leonard Lyon.)

Mr. Leonard Lyon: These are not file wrappers. They seem to be abstracts. I don't know who they were prepared by. They are abstracts and not file wrappers. [914]

Mr. Mockabee: They are not complete.

The Court: You say, Mr. Charles Lyon, that there was a stipulation regarding them?

Mr. Leonard Lyon: He can use them but he misdescribed them.

Mr. Mockabee: I used the wrong term.

The Court: That will be Poux BK.

Mr. Leonard Lyon: Has your Honor ever used one of those file histories, as we call them, instead of file wrappers?

The Court: I don't think I have ever seen a file history. However, the file history in the Silberman patent will be Exhibit BL in evidence.

Exhibits BK and BL are in evidence.

(The documents referred to, marked Defendant's Exhibits BK and BL, were received in evidence.)

The Clerk: All of these are in evidence?

The Court: All the patents are in evidence, yes. What about using them, Mr. Lyon?

Mr. Leonard Lyon: Somebody is going to have to show you how to use them, I think.

I think we can do that in argument but they are something like an abstract of title. Instead of setting forth the application as it was originally filed and the Patent Office actions and the amendments, there is supposed to be and I assume there is at the end, a printed copy of the patent in [915] question and then it is marked up in red ink and by going back to the different papers that are referred to by letters in that red ink you will find an abstract of those papers.

It is not made in the Patent Office. It is made by some private person who usually is in the business of making those kind of abstracts.

If you know how to read them they sometimes save time and sometimes leave you quite at a loss.

The Court: All right, I will struggle with them.

Mr. Mockabee: I think that will be all, your Honor.

The Court: The defendant rests?

Mr. Mockabee: Yes, sir.

The Court: Well, it is time to adjourn. What do you estimate as to tomorrow, Mr. Lyon?

Mr. Leonard Lyon: Well, I want to complete that prior art chart. If we can get that done tonight I think we may be through in the morning.

The Court: Let us wind it up tomorrow if we can. If we can wind it up in the morning you can have a little time to discuss it in the afternoon.

Mr. Leonard Lyon: I have an exhibit here which I agreed to get and which I would like to have marked.

This is an agreement of September 2, 1947, between Talon, Inc. and Rex Slide Fastener Corporation and replaces the agreement between Talon and Ernst Company of June 1, 1945, [916] which is already in evidence as Exhibit AG. This might be made AG-1.

The Court: We will call it AG-1 and receive it in evidence.

(The document referred to, marked Defendant's Exhibit AG-1, was received in evidence.)

Mr. Leonard Lyon: Does your Honor want to go ahead now?

The Court: No, I am just getting some things together. We are in adjournment right now. I am trying to look over some material to take with me for this evening.

Mr. Charles Lyon: May I withdraw Exhibit AG-1 for the evening so I can get some photostats made?

The Court: Yes, you may. Let us say 9:30 tomorrow morning.

Mr. Leonard Lyon: Very well, your Honor.

(Whereupon, at 4:30 o'clock p.m. a recess was had until 9:30 o'clock a.m., Friday, March 11, 1955.) [917]

Friday, March 11, 1955, 9:30 A.M.

The Court: Call the case.

The Clerk: No. 10450-C Civil, Talon vs. Union Slide, further trial.

Mr. Mockabee: If your Honor please, I have no transcript at my disposal. I would like a little clarification of the matter of the defendant's showing of damages. It seems to me there was discussion about whether it should be submitted after you rendered your decision on the matter of the counterclaim, and as I recall it, you took it under advisement, and I don't remember exactly what the present status of it is.

The Court: My recollection was that I indicated that we would try the case at this time and not try it piecemeal, although I indicated that I might decide some of the issues which might have some bearing on that question.

Mr. Mockabee: I didn't mean to present it at a later date. The defendant's accountant is naturally tied up very busily with tax matters at the present time.

What time did you expect that you would have those figures, Mr. Lipson?

Mr. Lipson: Saturday.

Mr. Mockabee: By tomorrow, so that they could be submitted almost immediately. [920]

The Court: What is your theory of damages on the counterclaim?

Mr. Mockabee: One of the principal ones, as I understand it—I haven't seen any figures on it at all, your Honor, yet——

The Court: Aside from specific figures.

Mr. Mockabee: ——is the loss suffered by the plaintiff——

The Court: Plaintiff?

Mr. Mockabee: ——by the defendant, in any manner due to what we have maintained in the counterclaim is a misuse of the patent?

The Court: Let's assume for argument there was a misuse of the patent, how can you show any proximate causation resulting in damages to this defendant?

Mr. Mockabee: I think not directly, but indirectly, is the cost of the suit. Particularly where the suit is filed on a half a dozen patents, and preparation has to be made and investigation made of half a dozen patents, and then this issue is narrowed down to two. It is part of the whole picture, your Honor, that is our position.

The Court: The element of the cost of defending the lawsuit, then?

Mr. Mockabee: I think that is one of the principal things.

The Court: What else? [921]

Mr. Mockabee: His loss of time, which of course would be part of his cost in the defense of the lawsuit.

The Court: You don't contend for any damage



to his business or loss of profits, or anything of that sort?

Mr. Mockabee: That, your Honor, I don't know. Can you show any of that? Loss of profits?

Mr. Lipson: Yes, I can.

The Court: How would you? How could you show any loss of profits or damage to his business, other than in the limited way that you have indicated?

Mr. Mockabee: In considering our charge that plaintiff in this area first tried to maintain a minimum price under the threat, which it carried out, of bringing in a cheap zipper at a much cheaper price to drive the local competition out of business if it couldn't make it maintain the price.

The Court: Even giving full value to that testimony, that was in no way tied in with patents. That was just tied in with the general principle of competition.

Mr. Mockabee: Well, I believe that that is probably considered in connection with the counterclaim, your Honor. [922]

The Court: You haven't asked for attorney fees, have you, in your pleadings?

Mr. Mockabee: I don't think the pleadings do, your Honor. I was thinking about it the other night when the question of the amendment of the plaintiff's answer came up.

I think actually and in all equity it is properly a subject matter for defendant's claim for a recovery because of the damage suffered.

Suit was brought on a half dozen patents but

finally it was narrowed down to two for one thing.

The Court: Well, I would be inclined to permit the amendment. I permitted the plaintiffs to amend. I am not, however, indicating what I might do after the case is submitted with reference to attorney fees.

I do have a serious question as to whether under any set of facts you can show any damage to the defendant's business in the way of loss or profits or otherwise.

Generally speaking, even if the issues on the misuse of patents were found in your favor I have an open mind as to whether or not the cost of defending the suit might be a proper item of damage. That part of the cost of it which concerns attorney fees might conceivably be considered under the contention that that was part of the general damage or special damage as the case might be, or attorney fees might be considered under a prayer for attorney fees in the [923] event you prevail. I am open-minded about that.

The other part of it I don't see how you can make a tenable contention that there was general damage to the defendant.

But the point is now you are not ready to proceed on that. I take it you will be ready to proceed the first of the week.

Mr. Mockabee: Yes, your Honor. Our theory is the general situation created by plaintiff, on the evidence brought out with regard to the counterclaim, has caused a loss of business profits to the defendant.

The Court: Again how has he lost any business profits if there were contracts that were restrictive on other manufacturers who were in competition with him. He wasn't bound by any of those contracts.

Mr. Mockabee: Not the contracts.

The Court: That gave him a better chance to spread out and make money making zippers if other competitors were restrained.

Mr. Mockabee: No, the contracts, the limitations imposed by the contracts did not. However, they are part of the general picture of the charge of domination of the industry. It is my theory that the attempt to maintain prices which, of course would not have caused a loss, but the attempt was followed by the threat which was carried out to [924] undercut them until they had to go out of business. That is what it amounted to. It was brought out regarding the introduction of the Wil-zip fastener in the East and the effect that it had upon small manufacturers.

The Court: But that is not connected with the patents.

Mr. Mockabee: No, sir, that is the counterclaim.

The Court: That is simply cut-throat competition.

Mr. Mockabee: Cut-throat competition as a result of their failure to bring the local manufacturers here in line on a minimum price.

The Court: You understand the general theory under which any private recovery may be allowed for violation of the antitrust laws.

Mr. Mockabee: I don't know that I can give you a good definition of it offhand.

The Court: Well, in a Government suit the Government only has to prove a public damage—that there was a violation of the antitrust laws which injured the public.

In a private suit there must be proved not only that the public was injured but there must be proof proximately how the plaintiff was hurt.

Mr. Mockabee: Yes, I understand that.

The Court: Now, it may be that your case looked at most favorably from your standpoint doesn't even go far enough to involve antitrust laws, but there is a middle ground in [925] there where we might conceivably have a misuse of patents. I am just thinking out loud.

A misuse of patents which would be against the public interest and conceivably, of course, under proper facts and proof you might have damage resulting from that. Whether or not you could have a cause of action in that manner apart from some antitrust violation I am not so sure. Most of these cases have been cases where the matter was tied in with some antitrust violation.

Mr. Mockabee: Well, it is part of our theory that the filing of the suits under the patents was a part of this general design to attempt to control the industry and because of the filing of the suits with an imposing number of patents in suit, I understand that the defendant had to go out and get money to operate on, not through ordinary sources at reasonable rates, but paying two per cent per

month interest which is quite a cost to him. [926]

The Court: How long would it take you to put on proof of this claim for damages?

Mr. Mockabee: It could be done, with cross examination, in one morning's time.

I haven't seen the schedule of damages yet, your Honor. He won't have it prepared until tomorrow.

The Court: I suggest that you attempt to organize whatever material you have to put it on expeditiously and we will arrange some time the first of next week, Monday or Tuesday, to take whatever proof you have on that subject. Your resting will be without prejudice to reopening for that purpose.

Mr. Mockabee: Defendant testified yesterday regarding records relating to the purchase of materials by Loew for the building of the so-called Loew machines prior to Mr. Lipson's association with the company, and also records regarding purchase of materials and equipment for the improvements which Mr. Lipson put on the machines. Is your Honor interested in receiving those records?

The Court: I don't care what you do about it. You are trying your case.

Mr. Mockabee: I don't want to burden the court with them.

The Court: I don't think it is proper for me to tell you what to do. The witness has testified to this matter; there has been no contradiction of it. [927]

Mr. Mockabee: If plaintiff is willing, we are willing to submit the regular business records which can be examined. If he will stipulate what they



show, I don't think there is anything particularly objectionable about them. Would you like an opportunity to look them over?

Mr. Leonard Lyon: I am not concerned. The witness has left the stand. I am not interested in recalling him.

The Court: Well, defendant will have permission to recall him if he decides to go into that matter. But if you decide to go into it, Mr. Mockabee, then I want you to exhibit these documents to counsel at some recess, and see what stipulations can be arrived at, and so forth.

Mr. Mockabee: I will be glad to turn them over to counsel at the present time.

The Court: I am not going to take time now to have him thumb through them. I will let you recall Mr. Lipson at some later time to do it.

Mr. Mockabee: Your Honor, I realized I rested yesterday. Yesterday afternoon there was quite a discussion about the showing of the manner of operation and the apparatus in the patent to Loew. I would like permission to reopen for the purpose of examining a witness to explain, in corroboration and in more detail, the actual operation of machines built by Loew according to his invention.

The Court: First of all, although you rested yesterday, [928] the discussion this morning indicating that you wanted to offer proof of damages indicates that you hadn't rested, and in substance I have said that you may offer evidence the first of the week, so you haven't rested. In other words, you have concluded a part of your case, but your

case has not been concluded. As to this witness, what is he, an expert?

Mr. Mockabee: He is a tool maker, your Honor, who has had a good deal of experience with zipper manufacturing machinery, and is so engaged at the present time.

The Court: I don't see why we should spend a lot of time on Loew. I think I know how it operates.

Mr. Mockabee: One thing that I wanted to bring out was the matter of this 27 stations proposition, which has to do with the manner in which the metal is fed. Actually Loew built machines with considerably less than 27 stations, even though 27 stations in itself is only a matter of a couple of inches, I would say.

The Court: What is this witness——

Mr. Mockabee: It creates an impression that Loew had a machine where the operations on the strip were strung out over 27 stations, it sounds like it might be a couple of feet, when it actually isn't, and there were not that many operations in the machine.

The Court: Are you talking about the patent, or are you talking about some machine built pursuant to the Loew patent? [929]

Mr. Mockabee: The actual embodiments of the invention of the Loew patent.

The Court: In the machines which defendant Union Slide had at its plant?

Mr. Mockabee: Yes, that Loew built. And also that there is apparent discrepancy between the

statement in the specification regarding 27 stations, and the showing in the figure of the drawing, where just by casual observation it seems extremely improbable that 27 stations are involved between the coining punch which forms the recesses and projections, and the cutting punch.

The Court: Outside of that bare statement about 27 stations in Loew, there is no description in Loew showing how the 27 stations operate. Is that a correct statement of fact?

Mr. Leonard Lyon: I think that is correct.

The Court: I don't attach much significance to that statement. In one place he makes that bare statement, 27 stations, but there is no description of why it takes 27 movements to make the one piece in the Loew patent.

If you want to call this witness to tell how the defendant's accused machines operate, I will permit you to, but I am not going to let him talk about the Loew patent, because I can read it as well as he can.

Mr. Mockabee: All right, sir. The witness also has knowledge of the machines which were operated by California [930] Slide Fastener, and the machines operated by defendant.

The Court: Are you going to examine him on both of these subject matters?

Mr. Mockabee: I would like to, your Honor, as briefly as possible.

The Court: What do you contend the California Slide machines were—Silberman machines?

Mr. Mockabee: They are what we have been

talking about as Silberman type machines. They were double headed chain machines; that is the general classification that we can give to Silberman machine, Exhibit 5, the machines used by California Slide Fastener, and the accused devices.

The Court: All right. Call your witness. Let's do it as expeditiously as we can.

SAMUEL BORSON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Samuel Borson.

Direct Examination

Q. (By Mr. Mockabee): What is your age and occupation, Mr. Borson?

A. I am 36, and I am a tool and die maker.

Q. Tool and die maker? [931] A. Yes.

Q. Would you speak a little louder, please?

Where are you employed?

A. Union Slide Fastener, Inc.

Q. What kind of work do you do at Union Slide Fastener?

A. I make and re-sharpen tools used by the machines, by the chain machines at Union Slide Fastener.

The Court: Keep your voice up.

Q. (By Mr. Mockabee): By chain machines, do you mean those for producing zipper stringers?

A. Yes.

(Testimony of Samuel Borson.)

Q. And the tools are the tools that are used to form the zipper elements, is that true?

A. Yes.

Q. Do you do any other work there?

A. I maintain all the machines on the assembly line in good working order.

Q. How long have you been at Union Slide Fastener?      A. Since April 1952.

Q. How long have you been employed in the slide fastener industry?

A. Approximately five years.

Q. Has your work during that time been approximately the same as that done at Union Slide Fastener, or not?      A. Yes. [932]

Q. Where did you work previously?

A. California Slide Fastener.

Q. In Los Angeles?      A. In Los Angeles.

Q. How long did you work there?

A. Sixteen months.

Q. Prior to that were you in the zipper industry?

A. Yes, connected with the zipper industry.

Q. Where?

A. Triple Tool and Die in Detroit.

Q. Did you do the same type of work there?

A. Yes, I done specialized form grinding on tools used by Talon, Conmar, and other companies.

Q. Did you ever build any chain machines for zippers?      A. Yes.

Q. For whom?

A. California Slide Fastener.



(Testimony of Samuel Borson.)

Q. Do you recall how many machines California Slide Fastener operated?

A. At the time I started working for them, they had four double header machines and one single header. [933]

Q. Did the double-header machines produce square-type or round-type zippers?

A. The double-header produced the round-type zipper.

The Court: Single-header zippers are square?

The Witness: The single-header was square, yes.

Q. (By Mr. Mockabee): Do you from your experience with zipper machinery know whether the double-header machines of the California Slide Fastener Company could readily have been converted to the production of square-end zippers?

A. No. It would have required a lot of experimentation and redesigning of the whole machine.

Q. When you were with California Slide Fastener was there any other employee engaged in the same work as you, same type of work?

A. Yes, my immediate supervisor, Norman Dasher. He was my supervisor on the work and then we also had an assistant toolmaker who was capable of resharpening tools.

Q. While you worked for California Slide Fastener Company did the company make any attempt to convert the double-header machines to a square-shoulder machine?

A. Yes. They have spoken about it but the su-

(Testimony of Samuel Borson.)

pervisor, Norman Dasher, claimed it was impossible and impractical to convert them.

The Court: Well, that is hearsay but the point is they never did it. [934]

The Witness: No.

Q. (By Mr. Mockabee): Do you remember ever seeing Mr. Lipson, who is seated here in the courtroom, at California Slide Fastener Corporation?

A. Yes. I recall seeing him but at the time I did not know who he was.

Q. Do you know why he was there?

Mr. Leonard Lyon: I object to that, your Honor.

The Court: Sustained. What did you see him doing, if anything, at California Slide Fastener?

The Witness: They were looking over and examining the double-header machines in particular.

The Court: Did you see him do any work on any of the machines?

The Witness: No, I did not see him do any work.

Q. (By Mr. Mockabee): Was any work done on them while he was there? A. No.

Q. Subsequent to his visit were any radical changes made in the machines after Mr. Lipson visited the California Slide Fastener?

A. No, not on the double-headers.

Q. On the single-header?

A. Well, we have built the single-headers completely from the ground. [935]

Q. Do you recall how fast the double-header chain machines operated at California Slide Fastener? A. From 1200 to 1300 RPM.

(Testimony of Samuel Borson.)

Q. Was any attempt made to operate them faster? A. Yes.

Q. Do you recall how fast they tried to run them or did run them?

A. We have stepped them up to 1800.

Q. What occurred?

A. Well, the tools started breaking down very fast and we had an awful lot of trouble in maintaining the height of the projection on the scoop.

Q. Do you know how fast chain machines at the Union Slide Fastener operate?

A. From 1400 to 1600 RPM.

Q. Is it easy to determine the speed of a zipper machine?

A. Yes. You can calculate it by the RPM rating of the motor. For example, if the rating of the motor is 1700 RPM and the flywheel pulley is nine inches, why, you merely multiply it times the nine inches and divide it by the diameter of the pulley on the motor.

You could also figure it by the chain coming out. There are 12 units to an inch. Now, taking the counter which measures the inches and the yardage you merely multiply that [936] times 12 and you will also get the answer per minute.

Q. You would have to time your counter?

A. Yes.

Q. You have to time it? A. Yes.

Q. I show you three exhibits in this case and ask you if you can——

The Court: Are these the tools——

(Testimony of Samuel Borson.)

Mr. Mockabee: Punches, yes.

The Court: I don't know what punches have to do with this case at all. If anybody can tell me how they can get a patent on a punch in view of all the prior art I will buy them a new hat.

Mr. Mockabee: Well, the Exhibit 5 of plaintiff's is a machine which has an entirely different type of punch than that shown in the Silberman patent.

It is a punch that forms notches forming the square shoulder elements as distinguished from the round shoulder element and the defendant I think has successfully shown that it was the one that developed and first used these punches on that machine, which was one of the things that made it a successful machine.

The Court: You are talking about the square-shoulder zipper?

Mr. Mockabee: With the notches cut in them, yes. [937]

The Court: Well, I can go along with you that the way the notches cut was also on a square-shoulder zipper but it will probably save time to let you put your proof in. Go ahead and show the exhibit to the witness.

Q. (By Mr. Mockabee): Can you state what type of punches these are? You are now examining Defendant's Exhibit D.

A. This punch is the type that we use at Union Slide Fastener on the No. 5 chain machine which I have ground.

(Testimony of Samuel Borson.)

Q. I hand you Exhibit AT and ask you if you can identify that type of punch?

A. This is the punch we use on the double-header machine, No. 3 chain, which I have also ground.

Q. I hand you Exhibit 5-D made in two parts and they are tied together in such a manner that they are reversed in position, but I will ask you if you can identify the type of punch embodied in that exhibit?

A. No, I don't recall seeing this punch before.

Q. Can you explain the reason for the grooves in the sides of the punches, Exhibits D and AT?

A. Would you repeat that question, please?

Mr. Mockabee: Will you read the question?

(Question read.)

The Witness: The grooves in the side of the punches are what we call fin trimmer slots.

The Court: What kind of slots? [938]

The Witness: Fin trimmer slots. And we use it to put two notches one on either side of the wire.

Q. (By Mr. Mockabee): Are you familiar with punches wherein those slots on the side do not occur? A. Yes.

Q. In other words punches where notching is not performed?

A. The round chain or the double-header machines that we used at California Slide Fastener did not have the slots in the punches.

Q. Is there much difference in the skill required



(Testimony of Samuel Borson.)

to produce the type for the round fastener and that for the notched strip?

A. Yes, very much. An ordinary tool and die maker could make a punch very easily of the type used by California Slide Fastener.

The Court: Do you mean by that that more skill is required to make the punch that is used to make the square hole zipper?

The Witness: Yes.

The Court: It is a harder job to do?

The Witness: It is.

Q. (By Mr. Mockabee): Do you know what kind of material feed is used on the machines of Union Slide Fastener?

A. We use what we call a roller type feed. [939]

Q. You mean that the wire is fed between a pair of feed rollers?

A. Yes; the wire is fed between the two rollers.

Q. Do you know of any other kind of feed?

A. There is a type of feed which is used by different industries what they call a friction slide feed.

Q. Does that embody the use of a finger or pin or engaging and feeding? A. Yes.

Q. Can you tell me the difference between them in the effect that it has on the manner in which that portion of the machine is made and the portion or relation between the feed and the forming punches?

A. Well, the roller type feed is more precise and they are both used in different types of work.

(Testimony of Samuel Borson.)

But in precision work we always prefer the roller type feed.

Q. Is there any difference in the compactness of the mechanism for feeding and forming a zipper element from a strip with regard to the two types of feed? A. (No answer.)

Q. Strike that. Are the zipper elements all formed in one operation at one point?

The Court: On what machine?

Mr. Mockabee: On any modern machines. Those of Union Slide Fastener. [940]

The Witness: No, they are not formed in one operation.

Q. (By Mr. Mockabee): Are they coined first?

A. Yes.

The Court: That is true of all machines, isn't it?

Mr. Mockabee: Yes.

The Court: I haven't seen a machine yet where with one stroke of the flywheel it does everything. Does anybody have one that does?

Mr. Mockabee: I am getting to this on elements that are separated entirely from the strip first. Some of the art shows that, your Honor.

Q. (By Mr. Mockabee): How many stations are there on the Union Slide Fastener machines between the coining station and the element severing or cutoff station? A. Five stations.

Q. Does that include the coining and the cutoff?

A. Yes. [941]

Q. Have you seen——

The Court: By five stations, you would refer to

(Testimony of Samuel Borson.)

five different actions that take place, each motivated by one turn of the crank shaft?

The Witness: Yes.

The Court: Five turns of the crank shaft, then.

The Witness: Yes.

Q. (By Mr. Mockabee): Have you seen any machines made in accordance with the disclosure in Exhibit O, patent to Sigmund Loew?

Mr. Leonard Lyon: I don't believe the witness has been qualified to read and understand a patent.

Q. (By Mr. Mockabee): Mr. Borson, have you had any experience in reading and interpreting drawings?

A. Yes. I could not do any work without blueprints, and I am very well versed in blueprint reading.

Q. Can you recognize what the drawing on that patent——

The Court: I am going to overrule any objections. If a man is a tool maker, as far as I am concerned I will give him as much credence or more than I will give the average so-called expert witness who comes in here to interpret patents.

Mr. Leonard Lyon: I agree with that myself, and I agree that he can read the drawing; but he was asked about the disclosures of the patent. If he confines his testimony to the drawing, why, there is no point in my objection. I don't know as he [942] knows how to interpret specifications.

Mr. Mockabee: I meant the drawing. We will restrict it to a consideration of the drawing.

(Testimony of Samuel Borson.)

Q. (By Mr. Mockabee): Have you ever seen a machine embodying the structural principles shown in the drawing of the Loew patent, Exhibit O?

A. Yes, this looks like a friction type feed on this exhibit, or a slide feed, as we often call it.

Q. Where have you seen it?

A. Well, I have seen it at Union Slide Fastener.

Q. What type of machine was that?

A. On friction type feed, on general press work.

Q. Was it a double header machine?

A. No, we did not use any of this type feed on our double header machines at Union Slide Fastener.

Q. Has the machine been in use since you have been employed there? A. No.

Q. But you have examined it, is that true?

A. Yes.

Q. Does it embody a coining punch and a finish forming and severing punch on a single ram or head?

The Court: Is the coining punch and the cut-off punch placed together on the punch block?

The Witness: I am a little off the track there. [943] I started talking about this slide feed, and now we are talking about the machine.

Q. (By Mr. Mockabee): Yes. I am moving over. In other words, is there an assembly of punches which move together as a unit in the machine?

Mr. Leonard Lyon: Which machine? I think the witness is confused.

Q. (By Mr. Mockabee): The machine we have

(Testimony of Samuel Borson.)

just been talking about, the single header machine.

A. The single header machine?

Q. Yes.

A. It has a series of tools employing the coining, notching, the blanking, and the cut-off and closing positions.

Q. Do they move together?

A. Yes, they move together, or they are timed together.

Q. Do you know, to your knowledge, who constructed that machine?      A. No, I don't.

Q. Do you know how many stations are involved between the coining and the cut-off, and including those two operations?

A. Between the coining and the cut-off—including the coining and the cut-off stations, is a total of five.

Q. Do you have facilities for producing machinery at Union Slide Fastener? [944]

A. Yes, we do.

Q. Do you produce any other type of machinery, or have you produced it?

A. Yes, we have produced machines, other machines for our own use, and we have also done defense work, where we have built different types of tools.

Q. Other zipper machinery?      A. Yes.

Mr. Mockabee: Your witness, Mr. Lyon.

Mr. Leonard Lyon: I have no questions, your Honor.

The Court: Step down. Thank you.



Is there anything further now, Mr. Mockabee, except your damage evidence?

Mr. Mockabee: No, sir.

I handed to the clerk this morning an outline of at least the principal prior art upon which we are depending. I was a little bit pressed for time over-night.

The Court: I wonder how we can treat this.

Mr. Mockabee: I have tried to make it what I would say if I were standing there discussing it within the limitations that I had for discussion.

The Court: Can we give it an exhibit number, not as evidence? Or how shall we mark it, what shall we do with it?

The Clerk: I thought it was a brief. Isn't that what it is? [945]

The Court: It is, in a way, in the nature of argument.

Mr. Mockabee: If I had given it verbally, it would have gone into the record.

With regard to some of the art, I believe I did previously make some remarks. It probably should be identified in some manner.

The Court: Is there any objection if it be copied into the record as the defendant's contentions as to the prior art?

Mr. Leonard Lyon: No, your Honor. That will be satisfactory.

The Court: It is entirely a matter of discussion or contention, because you can't testify.

Mr. Mockabee: Yes, sir.

The Court: The reporter will copy it into the

record as the contentions of the defendant as to the prior art applying to Poux '017 and Silberman '793.

(The prepared statement by counsel with respect to the prior art reads as follows:)

Re: Poux '017

Smith '352, Defendant's Ex. G, discloses a method of making paper box fasteners and issued in 1925. The drawing shows, in Fig. 2, a strip 20 with three fastener elements in their successive stages of formation, the end element being fully formed except for [946] the severing cut which finishes the tongue, numbered 11 in Fig. 3. It discloses the formation of a generally Y-shaped element by the punching out of the tongue 11.

On page 2, column 2, line 118 to page 3, column 1, line 4, it is stated, "Cooperating with the die 34 is a spring pressed plunger 35, which is shaped similarly to the die 34 and which is embraced by a female die member 36 which is adapted to move down over the margins of the male die 34 and perform the operation of punching out the end of the tongue 11. In the performance of this latter punching operation, it will be noticed that the adjacent pairs of prongs 12 and 14 are thrust downwardly into the pair of openings 33 and are thus prevented from being turned over or injured. The fasteners may be secured directly to the body of the box at this point or may be discharged into a hopper for packing."

On page 2, column 1, lines 4 through 10, it is stated, "In Fig. 2 I have illustrated the successive punching operations involved in the manufacture

of these fasteners; and it will be noted from this figure that the stock material is in the form of a strip of metal of exactly the same width as that of the finished fastener."

As in Poux '017, apparatus details are not shown, because it is a method patent and apparatus is not claimed. [947]

Hommel '266, Defendant's Ex. I, discloses a machine for making metal fasteners from a strip of material which is fed to a wire to which the fastener element is clamped. There is a metal ribbon 28 shown in Fig. 1, fed at right angles to a wire 32. The elements 11, shown in perspective in Fig. 9, are formed and secured to the wire or nail 10 at the same time, with no preliminary forming steps. While severing takes place a fraction of time before clamping, the element has been fed to its point of clamping before it is severed, and simultaneous attachment and severing is taught in Smith '352 above. Issued in 1928.

Johnson '667, Defendant's Ex. H discloses a method of making and attaching slide fastener elements and issued in 1929. It teaches the formation and clamping of not one, but a number of fastener elements, to a tape definitely before any of the elements are severed from each other. In each of Figs. 2 and 3, the lower five elements are fastened to the tape, yet are still connected together.

Sundback '884, Defendant's Ex. E, teaches the method of forming elements from a long strip and is entitled, not a slide fastener element machine, but "Sheet Metal Forming and Setting Machine."

It was owned [948] by Hookless Fastener Company, Plaintiff's former name, and issued in 1920. Sheet 11, Figs. 19 and 20 show a strip 1 with fastener elements 35 formed therein, the strip being long and the elements having recesses and projections and also jaws, shown at 35. The jaws are placed astride the edge of a tape while the member is held in the strip in the same position and location from which it was stamped from the strip. The member or element is not removed from the strip until it is clamped upon the tape. (See Poux claim 17, which calls for placing the jaws astride the edge of a tape while the member is integral with the strip, this being taught by Johnson '667.

Binns '413, Defendant's Ex. J, filed in 1930, teaches the formation, on a long strip of material, an interlocking member with interlocking portions and also jaws, placing the jaws astride a tape and closing the jaws. Maintaining the member integral with the tape until it is severed and secured to its intended carrier is taught by Smith '352, who teaches the entire method or mode of operation upon a strip, which mode of operation is illustrated by example in the specification in connection with a specifically different type of fastener.

Murphy '480, Defendant's Ex. N, teaches, in the punch press art, although a specifically different product, the formation from a long strip, of primer [949] anvils, which are kept integral with the strip until they are finally formed. This patent issued in 1928.

Sundback '857, Defendant's Ex. BF shows, in



Fig. 26, the long strip method of Sundback '884, Ex. E, which also is referred to in connection with the teaching of Smith '352, Ex. G.

Sundback '015, Defendant's Ex. M is referred to as illustrating, on sheet 4, Fig. 6, and sheet 6, Figs. 13 and 14, the formation of elements from a pre-formed bar of Y section, the method used by plaintiff for its present first line zippers.

Re: Silberman '793, Plaintiff's Ex. 3, in suit.

Poux '017, Plaintiff's Ex. 3, the other patent in suit, issued seven years prior to the filing of Silberman. Poux shows a method and claims it. Incidental to the showing of the method, there is illustrated apparatus which is not claimed as Poux' invention. It shows means for feeding a tape, rolls 12 and 13, to a predetermined position; means for feeding a metallic member towards that position, rolls 9; means immediately at that position for performing all operations upon the fed member to form slide fastener elements from the fed member and to attach the elements to the fed tape directly from the fed member, this being the head 14 with the forming members or punches 17, 19, 21 and 27 shown in [950] Fig. 2 and the jaw closing members 28 adjacent the cutter 23.

The means referred to above are in claim 1 of Silberman, which also includes specific limitations to the "feeding means" element of his general combination. These are a base, a ram, and cooperating means carried wholly by the ram and the base and driven from the shaft for forming and cutting



elements from the member and attaching elements from the member to the tape. Regarding these specific punch press parts, reference is made to Sundback '884, Def. Ex. E, which, in Figs. 1 and 2, shows a base, a shaft 8 carried thereby, a ram 15. In Fig. 4, Sheet 4, the ram 15 carries the forming punches 22, 36 and 38, punch 22 being a cutter. Fig. 3, Sheet 3, shows attaching or clamping jaws 46 which are carried by the base and connected by a shaft 50 and levers 51 and 52 to the ram 15, as described on page 3, lines 42 through 53.

Wintriss '662 of 1943, Defendant's Ex. BG, Sheet 1, Fig. 2 shows clamping jaws 58 engaged by cam 64 to actuate them, the cam 64 being directly on the main cam shaft. Also, while this patent is not prior art to Poux '017, it shows on Sheet 3, Fig. 12, the manner in which, as Lipson testified regarding the Poux method, it is necessary for the strip to flex down when it is sheared. [951]

Ulrich '380 of 1945 (filed prior to Silberman), Def. Ex. BH, on Sheet 3, Figs. 11 and 12, shows close positional relationship between the punches and the tape. It also shows cam operated clamping jaws 212 as in Wintress '662.

Taberlet '253 of 1942, Def. Ex. K, Sheet 2, Fig. 2, shows means on the ram (46 with its oblique cam face) for engaging a sliding element holder 45, 47, which has a cooperating cam face. Sheet 1, Fig. 9 shows jaw closing members 49 actuated by cam levers 52.

Behrens '783 of 1941, Def. Ex. BJ, Sheet 7, Fig. 15 shows a cutter 86 and jaw closing members 93.

Page 3, col. 1, lines 64-75 describes the operation of the clamping member to close the element with downward movement of the severing punch 86.

Wintritz '068 of 1940, Def. Ex. L for close association of cutter 98 and jaw closers 96.

Also Loew patent which was discussed at length on Thursday, March 10, 1955. [952]

The Court: Now, Mr. Mockabee, you are through with the exception of putting in some evidence with regard to damages?

Mr. Mockabee: Yes. There was mention of this license agreement yesterday, in which Mr. Lipson invested money for a half interest from Mr. Loew. Defendant I think spent most of the night trying to find it in his records and has not found it. The existence of it has been testified to. A photostat copy can be secured from Universal Button.

The Court: If anybody wants it, they can get a copy there. I don't know whether I want it or not.

Mr. Mockabee: All right, sir.

The Court: Are you ready now to proceed?

Mr. Leonard Lyon: I can proceed, subject to the defendant completing his case, at the first opportunity, your Honor.

The Court: All right. Let me take care of one thing here.

We had a letter of February 4, 1952. Was that ever given a mark?

The Clerk: Exhibit BE, your Honor, for identification.

The Court: I have read the Loew deposition,

and the offer of Exhibit BE in evidence will be refused, but it will be marked for identification so we will know what we are talking about. The witness Loew testified in the deposition that he used the letter to refresh his recollection, but his testimony consists of what he recollected, and the document itself [953] only used for refreshing his recollection. So the objection will be sustained to it. It will be available in the record to demonstrate——

Mr. Mockabee: Your Honor, regarding the admission——

The Court: Let me see, first. If I sustain the objection, of course it is really not part of the record. I could admit it into evidence with a limitation that it is not evidence whatsoever of what is contained therein, but it only shows what the witness was using to refresh his recollection.

Mr. Mockabee: That is satisfactory, your Honor.

The Court: Is there any objection?

Mr. Leonard Lyon: That is satisfactory to me.

The Court: All right. That will be the ruling, Exhibit BE received in evidence with the distinct limitation that the document itself has no evidentiary value in the case. It merely completes the record to show what Loew was referring to in his deposition when he talked about refreshing his recollection.

Mr. Mockabee: With regard to exhibits, your Honor, can I now offer Exhibits A, B, C, and D? They were offered for identification. A, B, and C are three zipper tapes. I asked Mr. Doble to try to

identify them. D was a Union Slide Fastener punch.

The Court: Did Mr. Doble ever identify those tapes?

Mr. Mockabee: No, he said he couldn't identify them. [954]

The Court: Then why should they go into evidence? They have no probative value.

Mr. Mockabee: I think I may want to use them, your Honor.

The Court: They are marked for identification. If somebody ever identifies them, they can go into evidence. But so far they are just a couple of strange pieces of tape.

Mr. Mockabee: That is true. It isn't important. Now, with regard to D——

The Court: Which are the tapes—A, B, and C?

Mr. Mockabee: A, B, and C.

Mr. Charles Lyon: Mr. Mockabee, D is in as AT.

Mr. Mockabee: I was going to say that was duplicated, and I was going to ask which one of those — according to my recollection, one witness identified Exhibit D and another one identified Exhibit AT.

The Court: The record shows that they were testified to be the same.

Mr. Mockabee: The same type of punch, yes.

The Court: Do you want to offer D in evidence?

Mr. Mockabee: It would be better, just so there won't be any confusion.

The Court: D will be received in evidence, and the offer of A, B, and C, the zipper tapes, will be

refused, objection sustained, without prejudice to any further offer if further [995] testimony is admitted.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit D.)

The Court: Are there any other exhibits, Mr. Clerk?

The Clerk: The Havekost deposition, which is AM, and the three documents, AM-1, AM-2, and AM-3, are under submission.

The Court: I am not ready to rule on that yet. Is that all?

The Clerk: Yes.

The Court: All right, Mr. Lyon.

Mr. Leonard Lyon: Mr. Burkitt.

### HENRY L. BURKITT

called as a witness in rebuttal by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Leonard Lyon): Will you please state your name, age and residence?

A. Henry L. Burkitt, 55; 19914 28th Avenue, Flushing, New York.

Q. You are a graduate of the University of Pennsylvania, 1922, is that correct?

A. That is correct.

Q. You are also a graduate in law with a degree of [956] LL.B. from George Washington University in 1927? A. That is correct.



(Testimony of Henry L. Burkitt.)

Q. While there you were awarded the Order of Coif, is that correct? A. That is correct.

Q. You were an examiner in the Patent Office, as an assistant examiner, from 1923 to 1927, is that correct? A. That is correct.

Q. You are admitted to practice law in the District of Columbia, the State of Pennsylvania, the State of New York, and admitted to practice in the federal courts for the Eastern District, the Southern District of New York, the State of Connecticut, the Court of Appeals for the Second and Sixth Circuits, and the Supreme Court of the United States; is that correct? A. That is correct. [957]

Q. You have served as chairman of the board of arbitrators, American Arbitration Association, is that correct?

A. I served on a number of occasions as chairman of the board.

Q. Do you know John T. Havekost?

A. I do. He is a friend of mine.

Mr. Mockabee: Will you speak louder, please?

Q. (By Mr. Leonard Lyon): How long have you known Mr. Havekost? A. Since 1927.

Q. How well were you acquainted with him?

A. He is a personal friend of mine.

Q. Do you know David Silberman?

A. I do.

Q. How long have you known Mr. Silberman?

A. About 1940.

Q. Under what circumstances did you meet Mr. Silberman?

(Testimony of Henry L. Burkitt.)

A. I was introduced to him by Mr. Havekost.

Q. We can't hear you out here.

A. I was introduced to him by Mr. Havekost in 1940.

Q. In what connection?

A. Mr. Silberman had been sued under the Conmar patents. [958]

Q. Mr. Silberman at that time was engaged in the zipper business, was he?

A. That is correct.

Q. And what was the result of your being introduced to Mr. Silberman so far as the Conmar lawsuit was concerned?      A. (No answer.)

Q. What were you supposed to do about the Conmar lawsuit?

A. I was his attorney of record until trial.

Q. For Mr. Silberman?

A. That is correct.

The Court: You say "until trial."

The Witness: Well, I was attorney of record. Other trial counsel were introduced at the trial.

The Court: Was this a case of Conmar vs. Silberman?

The Witness: That is correct.

Q. (By Mr. Leonard Lyon): Did you subsequently handle other patent matters for Mr. Silberman?

A. Continuously for Mr. Silberman.

Q. Did you file the application for the Silberman patent in suit as attorney for Mr. Silberman?

A. That is correct.

(Testimony of Henry L. Burkitt.)

Q. Did you prosecute that application as attorney for Mr. Silberman through to final grant of the patent? A. That is correct. [959]

Q. Were you advised at any time of any design work or any inventive work that was done by Mr. Havekost on a zipper machine?

A. Before the case came to trial I consulted with Mr. Silberman and Mr. Havekost on the machine that had been built before I had anything to do with their matter.

Q. What machine was that?

A. There was a rolling mill for rolling the elements and a cutting off machine to feed the rolled strip through that machine to attach the elements to the tape—two separate machines.

Q. Did you see those machines?

A. I was taken down to Philadelphia to the Hared plant at which time I was shown these machines.

The Court: These were supposed to be the machines that Silberman built that were alleged to be infringing by Conmar?

The Witness: That is correct, your Honor.

Q. (By Mr. Leonard Lyon): Were those the machines of the Silberman patent here in suit or some other machine?

A. Some other machine entirely.

Q. You are speaking now of visits to the Hared plant and speaking of a machine prior to the invention, to your knowledge, of the machine of the Silberman patent in suit?

(Testimony of Henry L. Burkitt.)

A. Yes, sir, that is correct.

Q. Now, did anybody explain those machines at the Hared plant to you? [960]

A. Mr. Havekost was with me at the Hared plant on the first occasion.

Q. Did he make any statement as to who designed those machines and built them?

A. No, not at that time—not on those machines. There was nothing said. They were just demonstrated.

Q. I asked you a question about if you ever knew of any machines that were built on a design made by Mr. Havekost.

A. There was a subsequent machine, and this was also before the suit was tried, where Havekost tried to overcome the feed of the attaching machine, still working with the formed element, tried to get away from the feed dog of the Conmar type machines and he introduced what we know as the Geneva motion. That was the second trip to Philadelphia.

Q. That you made——

A. To inspect this Geneva motion machine.

Q. When was that relative to your first knowledge of the Silberman machine that you patented in the Silberman patent in suit?

A. Quite a time if you are talking about the Silberman machine of the patent.

Q. Yes.

A. It was quite some time before the suit was terminated and the Silberman machine of the pat-

(Testimony of Henry L. Burkitt.)

ent comes after the termination of the suit. [961]

The Court: Well, it was before the Silberman application was filed then?

The Witness: Oh, yes, long before.

Q. (By Mr. Leonard Lyon): In other words the machine that Mr. Havekost designed and worked on, which you say you saw on the occasion of your second trip to the Hared plant, was a different machine from the Silberman machine of the patent in suit? A. That is correct.

Q. Both different in design and structure and different in time, is that correct?

A. That is right.

Q. Now, can you tell us just what—or, can you give us the essential features of the Havekost machine, if it was a machine, that you saw on the occasion of this second visit to the Hared plant in Philadelphia?

The Court: Let me see if we can tie this down a little better.

It has already been referred to as a Geneva motion machine.

The Witness: The second machine was the Geneva motion machine. The first one—I don't know who has to do with that machine.

The Court: What is the first machine?

The Witness: The first machines were those that I saw at Hareds. [962]

The Court: When you saw two machines?

The Witness: Well, there was one rolling mill and a number of these so-called attaching machines.



(Testimony of Henry L. Burkitt.)

The Court: All right. Then you saw a single machine which you say Havekost had made to get away from the feed——

The Witness: Dog.

The Court: Feed dog which you called the Geneva motion machine and which you call the Havekost machine.

The Witness: I call it the Geneva motion machine.

The Court: Counsel called it the Havekost machine.

Mr. Leonard Lyon: Yes.

The Court: Shall we call it the Geneva motion machine?

Mr. Leonard Lyon: I think that covers it.

The Court: What date was it you saw this machine?

The Witness: That is pretty difficult to answer, but it was quite some time before the trial. Possibly—I would say about two years before the trial.

The Court: I don't know when the trial was. That doesn't tell me very much. When was the trial?

The Witness: The conclusion of the trial must have been at the end of 1943. This was somewhere, I take it, around '41 or early '42.

The Court: All right, go ahead.

Q. (By Mr. Leonard Lyon): Now, what did this second [963] Havekost Geneva motion machine have to do with the trial? Was it built as an exhibit or something?

(Testimony of Henry L. Burkitt.)

The Court: You said the second Havekost machine.

Mr. Leonard Lyon: I understood——

The Court: So far we have had only one Havekost machine which was identified and I tried to pin it down to that. He calls it the Geneva motion machine that he saw about 1941 or '42 where Havekost had tried to get away from the feed dog. Now you say "second machine."

Mr. Leonard Lyon: I will call it the Geneva motion machine.

The Court: All right.

Q. (By Mr. Leonard Lyon): What did this Geneva motion machine have to do with the Conmar suit against Silberman?

A. Well, as I said before, he was trying to get away from the feed dog arrangement of the Conmar machines and he merely put this Geneva motion in place so as to get a step-by-step motion of the strip and that Geneva motion lasted about two or three minutes and broke down.

Q. Was the subject of the Conmar suit against Silberman against Silberman's use of a particular feed in the machine?

A. It was one of the essential elements of the Wintress patent.

Q. And you were interested as an attorney in the case [964] and in the machine or in an exhibit being developed that would eliminate that feeder, is that correct?

A. That is right.

(Testimony of Henry L. Burkitt.)

Q. And did you see this Geneva machine operate?

A. That was the first time, I understood, that they attempted to operate it. It broke down.

Q. Did you see it operate? A. Yes.

Q. And how long did it operate?

A. I would say about a minute and a half or two minutes.

Q. And what happened?

A. The Geneva motion broke down completely.

Q. Now, will you describe that machine to us?

A. Well, it was of the same type as the attaching machines that had been used by Hared before and it took a fed formed metal strip—the element had already been formed in the strip and fed it up to the place where the elements were chopped on to the tape.

Q. It was not a unitary machine in the sense that the same ram element that attached the zipper elements to the tape formed the zipper elements?

A. No; the forming was done in the rolling mill which was a completely separate machine.

Q. Now, how long—— [965]

The Court: Let me ask this question. So far we have had evidence about two kinds of feed for the metal strip. One is the knurled roller which operates with an intermittent motion pushing the strip forward, which appears in the Silberman patent and other devices. The other is the reciprocating finger shown in the Loew patent.

The Witness: Yes.

(Testimony of Henry L. Burkitt.)

The Court: Right?

The Witness: That is one of the forms.

The Court: We have heard about those two. What is this Geneva motion feed?

The Witness: The finger has to go back and forth—that is an intermittent motion. The rollers have to be rotated intermittently.

The Geneva motion is the most perfect theoretical way of getting an intermittent feed but it has great difficulty in mechanical applications.

The Court: Still I don't know what it does.

The Witness: It is a star wheel that has cuts in it and a pin fits into those cuts and as the wheel rotates in relation to a second wheel that pin engages the cuts and you get yourself a very slow motion of the fed part.

It is a standard movement. It has been used in watch work and stuff of that nature and it is good in those small mechanisms, but not in big machinery. [966]

The Court: All right.

Q. (By Mr. Leonard Lyon): On what do you base your testimony that the Geneva motion machine was, or unit, was designed by Mr. Havekost?

A. Merely that he said so and the machine was there and demonstrated to me at Hared.

Q. By him?

A. By him. He was present at that time.

Q. Was there any discussion or any statement by Mr. Havekost at any time to you that he was working on or designing a unitary machine, and

(Testimony of Henry L. Burkitt.)

by "unitary machine" I mean one in which there is a ram which carries tools which not only forms the zipper element but also actuates the cutting off device and the closure device?

Q. Not that I can recall that he ever had anything to do with.

Mr. Mockabee: Your Honor, I believe that counsel——

The Court: Just a minute. Let him finish his answer—"had anything to do with forming——"

The Witness: With forming in the same machine and the severing and attaching in the very same machine.

The Court: All right, Mr. Mockabee.

Mr. Mockabee: I object to this questioning, your Honor.

Plaintiff's counsel had an opportunity to cross examine Havekost himself at the time his deposition was taken and now [967] we are trying to get information through Mr. Burkitt as to what Havekost said.

The Court: Well, this has been a weird case. I don't think I know anything about law.

Time and time again I expect one counsel to make one kind of objection and take one position and he takes another.

I just got through making a note on the margin of my paper here that this probably resolves all doubt about the Havekost deposition in that Mr. Lyon is now going into this matter which probably resolves about letting the defendant use what Have-



(Testimony of Henry L. Burkitt.)

kost had to say. But now counsel objects. It throws me into confusion.

Mr. Mockabee: Well, my point was that—I wasn't thinking about the angle that you were thinking along, but Havekost testified as to what work he did in the production of the Silberman machine.

Plaintiff had an opportunity at that time to cross examine Havekost himself with regard to that but now apparently they are trying to get some further contradictory evidence in which to me is hearsay.

Mr. Leonard Lyon: We expect to show by this witness, your Honor, that Havekost never worked on the Silberman machine—wasn't even there—had nothing to do with it and I think this is consistent with his deposition.

The Court: Are you going to show that by Havekost's [968] statements or are you going to show that by a witness who trailed Havekost around every 24 hours?

Mr. Leonard Lyon: I am going to show it by the witness's testimony.

The Court: This witness' testimony?

Mr. Leonard Lyon: Yes.

The Court: But is this witness going to repeat then what Havekost said to him?

Mr. Leonard Lyon: No, no. He is testifying—he was the patent attorney for these people and he worked on these machines.

They were preparing for a lawsuit and they were working on it and he knows of his own knowledge

(Testimony of Henry L. Burkitt.)

what I brought out, that Mr. Havekost never claimed to have any ideas of a unitary machine while working with him which, I think, is not a question of whether Mr. Havekost was telling the truth, but a circumstance that your Honor will take into consideration.

If Havekost was inventing this machine, the Silberman machine that counsel is talking about, he certainly would have made it known to this witness.

The fact of the matter is he was working on a different machine as we expect to show by this witness.

Mr. Mockabee: I believe the deposition brings out that Havekost had no intention of trying to secure patent [969] protection and therefore why should he tell anyone that he was the inventor of any part of the machine or all of it. [970]

The Court: Before we proceed, let the record show that I have just read the Havekost deposition, Exhibit AM, and the attachments, AM-1 and AM-2.

I want to refer back in my notes to what we have under submission on Havekost, if I can find it.

About when did that take place?

Mr. Leonard Lyon: The deposition was offered at page 589 on March 8. It was at that time that I raised an objection to Exhibit 2 to the deposition.

The Clerk: Which is AM-2 in the trial.

Mr. Leonard Lyon: The deposition was offered at page 589 on March 8. It was at that time that I

(Testimony of Henry L. Burkitt.)

raised an objection to Exhibit 2 to the deposition.

The Clerk: Which is AM-2 in the trial.

Mr. Leonard Lyon: Your Honor explained to us at that time the difference between using a document to refresh your recollection, and the use of a document where you have no recollection even after looking at it.

The Court: You say it is page 589?

Mr. Leonard Lyon: Page 589.

The Court: We lawyers are made of frail substance. We get all stirred up about something and think it is very important, and sometimes it is and sometimes it isn't, and sometimes it is hard to see the forest for the trees to get perspective on some of these things.

First of all, Exhibit R is in evidence, offered by the defendant, a document signed by Havekost, being stipulated that the carbon copy might be used. It is some sort of a conveyance to Silberman, with some ambiguous language in it. [971] It is offered by the defendant, but I presume that it is going to be relied upon by both parties. Am I wrong about that?

Mr. Leonard Lyon: I think that is correct, your Honor.

The Court: Plaintiff is going to rely on the language they think is pertinent, and defendant is going to rely on what they think is pertinent.

With that state of the record, it then occurs to me that it is proper that Havekost should be questioned about things that preceded that occurrence.

(Testimony of Henry L. Burkitt.)

The situation would be stronger if the plaintiff had offered that document, but the plaintiff admits it is going to rely upon it.

However, we come now to the remark that I made to start with about we lawyers. I read this Havekost deposition, and it is clear from the Havekost deposition that Havekost, although in general terms he claims that he invented the Silberman machine, on cross examination he admits specifically that the machine he invented, if he invented one, was a machine that used preformed material.

He also, when asked about what his invention is, he thinks his invention consists of the taking of a crank shaft piston mechanism from an automobile and hooking it up with a punch press and a fastener; which I don't think even the plaintiff is going to claim is an invention.

So when the shooting is all over with, I attach very little significance to this Havekost deposition. I don't know, [972] in view of the cross examination, how defendant can get much succor out of it.

Then we have a lot of argument about whether the witness' memory was refreshed, and whether it was done properly, and discussion about Exhibits AM-1 and AM-2 for identification.

I suppose we will have to go through the deposition and pick out some of these objections.

On page 6 of the Havekost deposition, Havekost is shown the affidavit which is Exhibit 2 for identification. On page 6 of the deposition, AM, Havekost is shown the affidavit, which is now AM-2 for iden-

(Testimony of Henry L. Burkitt.)

tification, and he is asked if he recognizes that document, and he says, "That refreshes my mind, yes, sir."

"Do you recall having executed the original of that document?"

"Yes."

He identifies handwriting on the side. He tells who he delivered it to. Then the document is marked for identification only. It is not offered in evidence. And at the discussion we had beginning at page 589 and following there is no intention indicated on the part of the defendant to offer that affidavit, AM-2, in evidence, as evidence of the truth of what it contains.

Is that right? [973]

Mr. Mockabee: I believe Mr. Graham was discussing that, your Honor, and I, not having the record——

The Court: I just read it over and he so indicated.

Now, when it was marked for identification, of course the language was ambiguous. Page 7.

"Mr. Graham: I am offering it for identification."

That may be technically correct. Actually it is being marked for identification. It is not offered in evidence. At any rate, there is an objection then to apparently the offering of it for identification. Mr. McCoy objects. Self-serving, no foundation.

I take it many documents that a man might refresh his recollection from might be self-serving.



(Testimony of Henry L. Burkitt.)

The fact that he has identified it and tells what it was and lays the foundation, if any is needed for refreshment of memory.

A further objection that the witness is present, and this is not in support of any oral testimony, and leading in character.

Well, I know what Mr. McCoy means by "leading," but actually a document that refreshes a witness' recollection does that very thing, it makes him better able to answer a question that he wouldn't be able to answer if he hadn't seen it.

The Witness has established no independent recollection of the statements.

On that state of the record, if there is any need for an objection to the marking of a document for identification, I [974] will overrule the objection. So that brings us down there to where AM-2 is marked on page 8 of the Havekost deposition, line 8, marked as Exhibit 2 to the deposition, for identification. [975]

Now, we go on further. We will see where the next objection comes along.

I notice on page 12, lines 11 to 13, the witness says he was told by Silberman that Silberman wanted to develop a machine which would not be an infringement of the Conmar machine.

Can we, by stipulation, ascertain what patent or patents were being referred to with reference to the Conmar machine?

Mr. Burkitt: 2,201,068 and 2,221,740 is the second one.

(Testimony of Henry L. Burkitt.)

Mr. Mockabee: I believe they were respectively the Wintress and Ulrich, were they not?

Mr. Burkitt: Yes. The first one was Wintress and the second one Ulrich.

The Court: Are you satisfied with this identification of what they refer to as the Conmar machine?

Mr. Mockabee: Yes, I believe that is correct.

The Court: All right. I am trying to find the next objection. There is one on page 19 but I don't think that is being pressed at this time. In any event it will be overruled. That is on page 19, lines 17 to 22.

Mr. Leonard Lyon: The next pertinent objection is at the bottom of page 22, your Honor.

The Court: Well, there is an objection on page 21.

Mr. Leonard Lyon: I was referring to the objection of the use of the affidavit. [976]

The Court: All right, but while we are going through this deposition the objection on page 21 to the showing to Havekost the Silberman patent is overruled.

Now, we are on page——

Mr. Leonard Lyon: I will withdraw the objection at line 11 on page 22.

The Court: All right. Now, the next one is where?

Mr. Leonard Lyon: At the top of page 23. At the bottom of page 22 the question was:

"In Defendant's Exhibit 2 for identification

(Testimony of Henry L. Burkitt.)

there is a statement reading as follows" and so forth.

The Court: Well, the objection will be overruled on the ground that it wasn't the proper kind of an objection to have been made at that time.

In other words, we know how these things come up in the taking of a deposition. Objections have to be made on the spur of the moment and thereafter upon reflection, all of us think we could have stated our objection better, and that includes the court.

Mr. Leonard Lyon: That is why I made the objection in court, because this kind of objection doesn't have to be made at the taking of the deposition. Not being satisfied with the objection that was made I made one at the trial to the use—I am not objecting to Exhibit 2 being marked for [977] identification but what I am objecting to is it being received in evidence. And also I am objecting to it being used in the deposition as evidence or the witness being allowed to quote from it.

My experience with documents used to refresh recollection is while counsel on the other side can see them they are not evidence in the case and cannot be read into the record.

The Court: That is true—that is the general practice and this wasn't done properly to read the statement to the witness and then ask him if it is true. It is entirely different from asking the witness what recollection he now has after his memory has been refreshed.

However, there was no attempt at the time of the

(Testimony of Henry L. Burkitt.)

taking of the deposition to point that out and it really goes to the form of the question—the way the matter was submitted.

So, I am going to overrule the objection and permit the Havekost answers that follow to be part of the deposition and in evidence.

I have already told you what I think about the deposition.

Mr. Leonard Lyon: I think that covers the subject.

Then, as I understand it, your Honor has not actually ordered the Havekost deposition be received in evidence and be given an exhibit number.

I have no objection I can think of, no proper objection to the deposition being received in evidence as a deposition. [978]

The Court: Well, let me see what else we have here. All right, the Havekost deposition, Exhibit No. AM, will be received in evidence.

(The document referred to, marked Defendant's Exhibit AM, was received in evidence.)

The Court: Exhibits AM-1 and AM-2 will be received in evidence with the express limitation, however, that they are not evidence of any of the matters stated therein. They are admitted in evidence solely to complete the record to show what was before the parties at the time the deposition was taken and to what documents reference was being made.

They are expressly not evidence of the contents

(Testimony of Henry L. Burkitt.)

thereof or the statements contained therein. Any objection to that?

Mr. Leonard Lyon: None whatever, your Honor.

The Court: All right, Mr. Burkitt.

The Clerk: We also have Exhibit AM-3.

The Court: Exhibit AM-3 is the Silberman patent. We already have it in evidence.

The Clerk: That automatically puts AM-3 in evidence?

The Court: No, the Silberman patent, AM-3 is a soft copy and it is already in evidence under another exhibit number. All right, AM-3 received in evidence.

(The documents referred to, marked Defendant's Exhibits AM-1, -2 and -3, were received in evidence.)

The Court: Mr. Burkitt, will you take the stand again? [979]

The Court: Now we have a pending question. That is why I took time to read this Havekost deposition. There is a pending question and an objection just before the recess.

Mr. Leonard Lyon: The question was in substance, whether Mr. Havekost ever asserted to the witness that he was the inventor of the Silberman machine.

The Court: I think that was the question. That was the question and your objection——

Mr. Mockabee: My objection was that that information should have come from Havekost and that he should properly have obtained it at the time of



(Testimony of Henry L. Burkitt.)

the taking of the deposition when Mr. Havekost was testifying himself rather than getting it through hearsay from Mr. Burkitt. And I also note that at the time of the taking of the Havekost deposition Mr. Burkitt was present. It seems that they had ample opportunity then to get his direct testimony.

Q. (By Mr. Leonard Lyon): Were you present at the taking of the Havekost deposition?

The Court: The record so shows that Mr. Burkitt was present.

The Witness: I was present, your Honor.

The Court: Was present at the time.

Now, the defendant has offered the Havekost deposition and he has raised the issue that Havekost claimed that he invented the machine. It seems to me that this is in the [980] nature of impeachment and if it was to have been impeachment then a proper foundation should have been laid. The foundation should have been laid by saying to Havekost: "Well, did you ever state to Mr. Burkitt that you were the inventor of this device?"

Mr. Leonard Lyon: I will withdraw the question.

The Court: Now, it is after 12:00 o'clock and we will take a recess until 1:30.

(Whereupon, at 12:05 o'clock p.m. a recess was had until 1:30 o'clock p.m. of the same day.) [981]

Friday, March 11, 1955, 1:30 p.m.

HENRY L. BURKITT

the witness on the stand at the time of recess, having been previously duly sworn, was examined and testified further as follows:

Direct Examination—(Resumed)

Q. (By Mr. Leonard Lyon): At the time Mr. Havekost was working on the Geneva type machine, was he in the employ of Mr. Silberman?

A. He was in the employ then, yes.

Q. How long did he remain in Mr. Silberman's employ?

A. It wasn't too long after that unsuccessful experiment that I think the whole thing folded up with Mr. Havekost.

Q. Can you fix the date of his leaving Mr. Silberman's employ, approximately?

A. I can't fix the date, but it was quite some time before the suit was being pressed for trial.

Q. I can't quite hear you. About what year?

A. Probably toward the beginning of '42, maybe before.

Q. Can you fix it with relation to the outcome of the case which was pending against Mr. Silberman?

A. Long before that.

Q. Long before that case was concluded?

A. Yes. [982]

The Court: When was the case concluded?

The Witness: As I said before, your Honor, I think it was at the end of '42. It could have been earlier than that.

(Testimony of Henry L. Burkitt.)

Q. (By Mr. Leonard Lyon): I can't hear you, Mr. Burkitt.

A. It could have been earlier than the end of '42. Somewhere around that time.

Q. After that was Mr. Havekost, to your knowledge, present at any of the future work that was done on zipper machines by Silberman?

A. Not at all.

The Court: You weren't present all the time that Silberman was working on the machine, were you?

The Witness: No. I was being called down, though, I would say, at least once a week, and sometimes three or four times a week.

The Court: Called down to where?

The Witness: To this Cooper Square place where Silberman was operating.

Q. (By Mr. Leonard Lyon): Did the Conmar suit end with a decree awarding an injunction against Mr. Silberman?

A. That is correct.

Q. What was your first knowledge of the work on the machine described in the Silberman patent in suit?

A. Well, the actual machine itself——

Q. The design and the development of that machine. [983]

A. There was quite a bit of work going on continuously during the time of the trial of the suit, and from that time forward. The machine itself didn't come into existence until—my first sight of

(Testimony of Henry L. Burkitt.)

an operating machine was somewhere around April 1944.

Q. Was any work done on that machine while Mr. Havekost was in Mr. Silberman's employ?

A. No. He had nothing at all to do with that.

Q. Will you speak a little louder, please?

What relation, if any, did the injunction in the Conmar case have to the effort to produce the machine of the Silberman patent in suit?

A. Well, in the first place, we had the form strip business of the 2,201,068 patent, and then the Ulrich patent specifically claimed an element, a similar element, the square legged element we have been hearing about that.

The Court: What patent is that?

The Witness: 2,221,740 was the square legged element patent.

The Court: That first patent was whose patent? What is the name of it?

The Witness: Wintritz.

Q. (By Mr. Leonard Lyon): And those were the two patents the decree in the Conmar suit enjoined Silberman from using?

A. That is correct.

The Court: What was the name of the second patent? [984]

The Witness: Ulrich, U-l-r-i-c-h.

Q. (By Mr. Lyon): Well now, what did the injunction under those two patents have to do with the attempt to develop and design the Silberman machine of the patent in suit?

(Testimony of Henry L. Burkitt.)

A. In the first place, in the development we were getting away from the formed strip approach and Silberman wanted his men to make a machine in which the whole operation from plain flat strip would produce a zipper tape with elements attached, and we ran through continuous discussions for months there in which all of these patents had been considered, including the square-legged patent business and of course my function there was to keep him away from contempt of the injunction on the square-legged element.

The development ran along with the presentation to me on various occasions of punches and dies, sometimes with demonstrations in an actual press, to show the formation of the strip end.

No tape was run through the machine at that time because it was just to prove that punches and dies co-operate on the flat strip.

But quite a few of these attempts on his part didn't meet with my approval because the injunction, as I read it, would open him to a charge of contempt on the square-legged element regardless of whether he didn't use formed strip. And quite a bit of our battling around was to make a zipper [985] from flat—plain flat strip as a continuous operation in the same machine without violating this square-legged element patent.

Q. When did the work on the Silberman machine that you are referring to actually commence, according to your best recollection?



(Testimony of Henry L. Burkitt.)

A. It commenced somewhere in the time that the suit itself was going to trial.

Q. And what year was that?

A. That was at the end of '42. It started October 1942.

Q. And when was your first knowledge of the completion and operation of a machine constructed in accordance with the drawings of the Silberman machine patent in suit?

A. Are you talking about a finished machine?

Q. Yes. A. That was in April 1944.

Q. Then there was a period of at least 15 or 16 months required for the development and design and building of that machine. Is that according to your recollection? A. That is correct.

Q. And you were in continuous touch with that development and the progress of that effort throughout that time, and by "continuous touch" I mean as you have stated, you were called down where the work was being done and consulted frequently every week, is that right? [986]

A. I was called down there and Mr. Silberman was in my office. I would say if it wasn't every day it was at least three or four times a week.

Q. And you were acting as Mr. Silberman's patent counsel in those conferences, were you?

A. That is correct.

Q. Now, can I have Exhibits—the two punches, Exhibit AT and AS?

The Court: You have given a number for the Ulrich patent that I can't identify.

(Testimony of Henry L. Burkitt.)

The Witness: I don't think it is in the patents here, your Honor.

Mr. Leonard Lyon: We are going to have to try to find a copy of the Ulrich patent, your Honor. I tried to get one today at noon and we don't seem to have it in the courtroom.

The Witness: There is a similar patent——

Mr. Leonard Lyon: I would like to have the patent you mentioned. I can get it over the weekend. I can get it at the county library.

The Court: Here is an '075 of Ulrich.

Mr. Leonard Lyon: But that isn't the same.

The Witness: No, it is not the same, but it is the same structure but it is not the one.

Mr. Leonard Lyon: Similar drawing and disclosure.

The Witness: No, not similar drawing and disclosure. [987]

Mr. Leonard Lyon: And not the same claims.

The Witness: Not the same claims. It is a little different from the device there.

Mr. Leonard Lyon: I will have a copy of the Ulrich patent that the witness has referred to for the record.

Q. (By Mr. Leonard Lyon): I will call your attention to Defendant's Exhibit AT and AS. Do you know what the grooves in those punches are for?

A. There are grooves in only one punch and that is AT.

The groove in the AS exhibit is a release pas-

(Testimony of Henry L. Burkitt.)

sage. I take it that you are referring to the side grooves?

Q. That is correct.

Mr. Mockabee: Will you speak louder, please?

The Witness: These side grooves were the trim, release on the punch which co-operated with a member in the base to trim the element.

Q. (By Mr. Leonard Lyon): And by that trimming what shaped element is finally produced?

A. A square-legged element.

Q. When did you first see a punch with those side grooves for that purpose?

A. Well, one of the sets of punches and dies submitted to me before April 1944 included these trimmed sections and of course the accompanying member in the base, which we call [988] a die.

Q. In making your last statement have you in mind any particular incident that you were involved in in connection with such a punch?

A. Well, Silberman wanted to use this particular arrangement for making the square-legged element. I had to tell him that my interpretation of the injunction was that he was looking for trouble.

The Court: When you say it was submitted to you before April 1944, you mean submitted to you by Silberman?

The Witness: Submitted to me by Silberman, yes.

The Court: But you never incorporated a die of that design in the Silberman drawing, did you?

The Witness: I certainly did not.

(Testimony of Henry L. Burkitt.)

The Court: It was old in the art.

The Witness: It was old in the art at that time to this extent, that Silberman was doing it—I wasn't looking for this patent being used as evidence afterwards of a disclosure in contravention of the injunction.

Q. (By Mr. Leonard Lyon): What was the reason that you did not show such a device in the Silberman patent?

A. Because I thought that he had developed an element by which he could avoid the square-legged element for that purpose until some determination were made in some other litigation as to the square-legged element. [989]

Q. You mean in connection with the injunction that was issued in the Conmar case?

A. That is right, yes.

Q. And did you permit Mr. Silberman to use such a punch in his earlier machines while that injunction was in effect?

A. As far as I was concerned I would not permit him to use it.

The Court: Is this Conmar injunction reported?

Mr. Leonard Lyon: No, but we hope to have a copy of it.

Mr. Charles Lyon: What was the name of the case? Conmar against whom?

The Witness: Lamar.

Mr. Leonard Lyon: Is it reported, do you know?

The Witness: It is not reported. [990]

The Court: It went to trial on the merits?

(Testimony of Henry L. Burkitt.)

The Witness: It went to trial on the merits.

The Court: Findings and conclusions of law?

The Witness: There is a peculiar situation there, that Silberman didn't have enough money during the trial to proceed with the trial, so even though he was represented by these other trial counsel at the commencement, they decided to walk out during the trial, and the proceeding was permitted to go along as an inquest, whereupon Judge Woolsey handed down his decision, written decision, which apparently was not reported.

The Court: Is that the one where Woolsey called Silberman a pirate?

The Witness: That is correct.

The Court: You were of counsel in that case?

The Witness: I was of counsel in that case.

Mr. Leonard Lyon: But you had other famous counsel in the case with you, did you not, for Silberman?

The Witness: Kenyon and Kenyon.

The Court: Well, these patents that were adjudicated in Conmar vs. Lamar were combination patents, weren't they?

The Witness: No. The Ulrich patent is an element patent.

The Court: An element patent?

The Witness: For the slide fastener element, with the [991] legs being formed in a certain way that the final result would be a smooth outside face, over which the slider would operate.

2,201,068 patent, the Wintritz patent, was a proc-



(Testimony of Henry L. Burkitt.)

ess of rolling a strip and then a separate machine for taking that rolled strip and severing those formed elements, attaching them to the tape. That had nothing to do with the formed element. There were two separate patents involved.

The Court: Do I understand, counsel, that you content there is a difference between a patent that shows an element that is a result of a description, where the patent shows the manner in which the element is made, from another patent which shows a process to make an element, and a third situation being a machine to make an element—are those three different legal animals in the patent field?

Mr. Leonard Lyon: They are three different kinds of patents, and you might infringe all three of them, or you might infringe any one of them without infringing the other. If the patent was on the element itself, you might or might not infringe the patent on the machine, if you used that type of machine to make the element. Or if you used a non-infringing machine to make that element. And if the patent was on the process of making the element, you might use that process or not, perhaps you could find another way of making the element. But if there is a patent on the element, you couldn't make it no matter what machine or what process you used. [992]

The Court: How is a patent on the element, if there is such a thing, any different than merely a design patent?

Mr. Leonard Lyon: I have Judge Yankwich's

(Testimony of Henry L. Burkitt.)

decision here in his case in which he sustained a patent on the zipper structure itself, not on the way it was made, and it might help your Honor some time—this is an extra photostatic copy—if you would like to read that. That was a patent on the zipper itself; not on a machine for making it or a process for making it.

If you made that zipper, it didn't make any difference what process you used or what machine, you would infringe that patent.

The Court: I still say, what is the difference between that and a design patent?

Mr. Leonard Lyon: A design patent covers the ornamentation, or artistic value, if any, the device has. A patent on an element is on the mechanical merit of the element. You could call it a design patent in the sense that it is a patent on the configuration or shape or form of the thing itself. A design patent that issued is a different kind of patent, your Honor; it is for artistic merit, the appearance of something, not its utility or structural utility.

The Court: All right. Go ahead.

Mr. Mockabee: Your Honor, here is a printed copy of the Lamar and Silberman decision. I think Mr. Burkitt could probably [993] identify it.

Mr. Leonard Lyon: Well, that is fine. Thank you.

Mr. Mockabee: You are welcome.

Q. (By Mr. Leonard Lyon): Can you identify this as the decision, so-called, findings of fact and

(Testimony of Henry L. Burkitt.)

so forth, that were entered by Judge Woolsey in the case that you are referring to?

A. I can identify, I think, this copy as something that was distributed by Conmar after the suit. I have no way here of determining that it is the decision.

Mr. Leonard Lyon: I think that we can agree that this is the decision and decree in that case, can we?

Mr. Mockabee: I am willing to stipulate.

Mr. Leonard Lyon: I will ask that it be received in evidence as a plaintiff's exhibit.

The Court: What is the number?

The Clerk: Plaintiff's Exhibit 16, your Honor.

The Court: 16.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit 16.)

Mr. Leonard Lyon: I would now like to pass to another subject, your Honor. I want to fix the date that the witness first saw the completed operative machine of the Silberman patent in suit.

First I will ask that a copy of the agreement between [994] Cap-Tin Development Company and Queen Manufacturing Company, April 7, 1944, be received in evidence as Plaintiff's Exhibit 17.

This agreement is included among the plaintiff's interrogatory answers, I believe.

The Clerk: But you want to use this copy instead, is that it?

Mr. Leonard Lyon: Pages 15 to 21. If we may

(Testimony of Henry L. Burkitt.)

mark that copy, it would be better, and then I can keep this copy.

Mr. Charles Lyon: Those are the interrogatory answers of February 19, 1953, the second set.

The Clerk: Is that in evidence, your Honor?

The Court: In evidence. Exhibit 17 received in evidence. I think I said also Exhibit 16.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 17.)

Mr. Mockabee: Your Honor, is that the same agreement as Defendant's Exhibit AA?

The Clerk: AA is pages 32 to 48.

Mr. Leonard Lyon: That is a different agreement.

Q. (By Mr. Leonard Lyon): Did you negotiate for Mr. Silberman and were you a party to the writing of Exhibit 17?

A. I didn't negotiate this, but I did have to do with an opinion that is mentioned in this agreement.

Q. Were you familiar with this agreement at the time it [995] was made? A. Yes.

The Court: This is between Cap-Tin and who?

Mr. Leonard Lyon: And Queen Manufacturing Company.

Q. (By Mr. Leonard Lyon): Who was the Queen Manufacturing Company?

A. That was an organization of a few people——

Mr. Mockabee: Will you speak louder, please?

(Testimony of Henry L. Burkitt.)

The Witness: It was an organization of a few people who started into business with a Silberman machine.

Q. (By Mr. Leonard Lyon): Was that the first machine that was sold by Silberman of the type shown in his patent here in suit?

A. So far as I know, that was the first that was sold.

Q. Had that machine been completed and sold prior to the date of this agreement, April 7, 1944?

A. It was sold with that agreement.

Q. It was sold with that agreement?

A. On that date.

Q. This agreement on the first page in the recitals states that the Cap-Tin—that is Silberman—has heretofore exhibited to Corporation an opinion of patent counsel, copy of which is annexed and made part of this agreement.

Do you know whose opinion that was?

A. That was my opinion. [996]

Q. And what did that opinion relate to?

A. It covered the machine which I had seen operating in Silberman's plant.

Q. Prior to the date of this agreement?

A. That is correct.

Q. Was that an opinion as to whether or not the machine which was being sold to the Queen Company, as recited in this agreement, was an infringement of any outstanding patents to third parties?

A. That was the opinion for that purpose.



(Testimony of Henry L. Burkitt.)

Q. And can you therefore fix, by reference to the date April 7, 1944, of this Exhibit 17, the fact that a machine constructed in accordance with the drawings of the Silberman patent in suit had been completed and sold prior to April 7, 1944?

A. My opinion was written on the machine which had just been completed, and the opinion was as this agreement states, used as a basis for this agreement. The opinion was, therefore, based upon the operating machine, which was first demonstrated to me prior to the making of this agreement.

The Court: You had seen the machine operate prior to April 7, '44?

The Witness: That is correct, your Honor.

Q. (By Mr. Leonard Lyon): How many machines of that identical structure were manufactured at that time by Mr. [997] Silberman?

A. I don't know how many he had parts for; when the demonstration was made to me there was one machine running in the plant.

Q. And was that the one that was sold to the Queen Company?

A. I don't think so, because I supervised the knocking down of the machine for making patent drawings, took my draftsman in there for that purpose. I don't think he sold that specific machine, because I saw it on a number of occasions following my first inspection.

Q. Who actually made the drawings that appear in the patent in suit, the Silberman patent?

(Testimony of Henry L. Burkitt.)

A. Edmund G. Gessmann.

Q. Was he your draftsman?

A. My patent draftsman.

Q. From what did he make those patent drawings?

A. From the machine, and also from sketches supplied by the draftsman, but mainly from the machine itself which was knocked down for that purpose.

Q. Were you present with the draftsman when he inspected the machine? A. Sure.

Q. Did you check the patent drawings against the machine? [998]

A. After he made the patent drawings, I came back and had the machine knocked down a second time so as to check the specification against the machine itself.

Q. Did you proceed promptly with the filing of the application, I mean the drawings were made diligently and you were diligent about preparing the text of the application?

A. As quickly as we could we prepared the drawings and then the text, and checked the drawings against the machine to get it on file.

The Court: Is this evidence, Mr. Lyon, of what you refer to as the swearing back to show Silberman was prior to Loew? [999]

Mr. Leonard Lyon: Yes, your Honor.

I ask a copy of the letter addressed to Mr. Sigmund Loew and Union Slide Fastener Company

(Testimony of Henry L. Burkitt.)

dated August 11, 1948, be marked for identification as Plaintiff's Exhibit 18.

The Clerk: Marked Plaintiff's Exhibit 18 for identification.

(The document referred to was marked Plaintiff's Exhibit 18 for identification.)

Mr. Leonard Lyon: While counsel is looking at this exhibit I will ask another question on another subject.

Q. (By Mr. Leonard Lyon): Were you present in April, 1944 at a run of the Silberman machine which you referred to, at which time its speed of operation was determined?

A. At that time the speed was not determined, but the machine was running with the tape and elements coming off.

The Court: This was in April of 1944?

The Witness: April, 1944, yes, before this Queen machine was sold.

And I was fascinated by the standing still effect, of the stroboscopic effect of the elements. They were going down as a continuous white band. I don't remember whether it was steel or aluminum being used, but it was a continuous white band they were going so fast. And after I stood there for some time I asked somebody to come over and knock the machine down so I could see the internal parts. [1000]

They didn't want to do it because Silberman wanted the machine run continuously until the punches wore out or broke down and I told him I

(Testimony of Henry L. Burkitt.)

wouldn't wait around until that happened and made them break it down at that time.

Q. (By Mr. Leonard Lyon): Well, did you at some date determine the speed of that machine?

A. There was a test run made for me at Cooper Square, I am pretty sure it was, and they used a tachometer at that time.

Now, that speed run was for the purpose of showing me that the Silberman machine of the patent could make and attach elements as fast as the Conmar machine could merely cut off and attach.

The Court: This speed run was later?

The Witness: Later than April, 1944. It was long before the application was filed.

The Court: What speed did it attain?

The Witness: Somewhere between 2,000 and 2,500. My recollection is around 2,200.

The Court: Did that machine you saw operating have the steel spring bars across the top of it similar to Exhibit 5 in Judge Hall's courtroom?

The Witness: No, that was a later development still.

The Court: Did it have the lip on the closing jaw?

The Witness: The closing jaws are the same as they are [1001] in the patent two step.

The Court: Did it have a vacuum attachment to clean out the metal?

The Witness: We weren't taking any metal off the strip at that time.

(Testimony of Henry L. Burkitt.)

Mr. Mockabee: I can't hear the witness.

The Witness: We weren't taking any metal off of the strip that time. That was a complete scrap-less metal.

Q. (By Mr. Leonard Lyon): Then the answer is no to the court's question?

A. No. There may have been an air blast there to keep it clean because the cutting punches themselves shear off little bits of metal that have to be blown out of the punches regardless of whether you are taking scrap or not.

Mr. Mockabee: Your Honor, regarding the letter. You testified that you wrote this letter, Mr. Burkitt?

Mr. Leonard Lyon: I haven't had a chance to ask him any questions about it yet.

The Court: There is no testimony about it yet.

Mr. Mockabee: Pardon me.

Q. (By Mr. Leonard Lyon): I hand you Plaintiff's Exhibit 18 for identification. Is this a copy from your files of a letter mailed by you under date of August 11, 1948 to Sigmund Loew and Union Slide Fastener Company, Inc., by registered mail? [1002]

A. It is. I have looked at it before. I gave it to you before the recess.

Mr. Leonard Lyon: I will ask that Exhibit 18 be received in evidence.

Mr. Mockabee: Your Honor, the letter has no signature on it. It has some initials that apparently are not Mr. Burkitt's initials. It also says



(Testimony of Henry L. Burkitt.)

"registered mail" and I was wondering whether they had any evidence that it was delivered by registered mail.

The reason I ask that is because I just consulted my client and he doesn't recall getting it.

The Court: Well, that seems to be an inquiry and not an objection.

Mr. Mockabee: I made it the basis of an objection, your Honor.

The Court: What are the initials A-B-7 mean?

The Witness: Those are the notations that I dictated, "A" and others are my secretary's.

The Court: You are No. "A," are you?

The Witness: That is correct.

The Court: And the secretary is "B?"

The Witness: Yes.

The Court: Did you have seven secretaries?

The Witness: No. This was the seventh one in that line. I have a method of designating the successor secretaries. [1003] 7 would be a particular person.

Those initials at the top are the initials of the secretary at the time the letter was mailed.

This copy is a copy of the letter in my file book and only letters which were mailed and so initialed are put in that letter book.

Mr. Mockabee: Was there any return receipt on that letter?

The Witness: So far we haven't been able to trace the file in connection with that letter, so I instructed my secretary from here, to look up the

(Testimony of Henry L. Burkitt.)

letter book which she did, and sent me this copy. I received it today.

Q. (By Mr. Leonard Lyon): Do you recall this letter?

A. Oh, yes. I remember sending this letter and the subsequent letter that you are holding now in your hand. The subsequent letter was merely to send a copy of the patent which arrived in my office the day after I sent the other.

Q. You are referring now to Exhibit 15?

A. That is correct.

Q. And did you send this Exhibit 15 in the regular course of mail to the Union Slide Fastener Company on August 12, 1944?

A. That is correct. That was the—those are the initials that indicate the date.

Q. 1948? [1004]            A. 1948, yes.

Q. And did you enclose with that letter a copy of the Silberman patent in suit?            A. I did.

Mr. Leonard Lyon: We will ask Exhibit 15 for identification be received in evidence here as Exhibit 15.

Mr. Mockabee: I will have to make the same objection, your Honor. My client doesn't recall having received either of those letters.

If he recalled it I would be willing to stipulate to them but he has no recollection of it.

The Court: You patent lawyers simply ignore all the rules.

There is a customary rule around this jurisdiction that if you want to use the copy of a letter

(Testimony of Henry L. Burkitt.)

you serve upon the other side a notice to produce the original. Then if they don't produce the original you lay a foundation and use a copy.

Mr. Leonard Lyon: Usually the defendant in a patent case, if you produce your office copy of a notice you sent to him by registered mail, you don't have to go to that trouble. But we certainly will file such a motion if you think it is necessary.

The Court: It is not a motion. I am talking about a notice to produce. [1005]

Mr. Burkitt, as to Exhibit 18, the one-page letter, 18 for identification, did you have any personal knowledge that this letter was mailed?

The Witness: I know it was mailed because I recall the mailing of it by my secretary, particularly in connection with the subject matter in the second or third paragraph.

The Court: Do you remember the obtaining of a return receipt?

The Witness: That would have gone into the file by the secretary when it came in.

The Court: And what about Exhibit 15 for identification. Do you have any personal knowledge about that?

The Witness: I remember that we didn't have copies of the patent in the office when the first letter went out, so when they came in the next day I just put one in the mail and sent it along to Union.

The Court: The objection is overruled. Exhibits 15 and 18 will be received in evidence.

(Testimony of Henry L. Burkitt.)

(The documents referred to, marked Plaintiff's Exhibit 15 and 18, were received in evidence.)

The Court: Let me read the letter.

Mr. Leonard Lyon: Very well.

The Court: Go ahead.

Q. (By Mr. Leonard Lyon): Did you know Morris Waldman? A. Murray Waldman.

Q. Was he employed by Mr. Silberman?

A. He was one of the employees of Silberman.

Q. At the time of the development of the machine of the Silberman patent in suit to which you have referred?

A. Prior to the time that I made my inspection and for some time afterward.

Q. And was he present at the demonstration of the machine that you have referred to in April, 1944?

A. My recollection is that he was the toolmaker that I requested to knock down the machine for me.

Mr. Leonard Lyon: May I have Exhibit 18?

Q. (By Mr. Leonard Lyon): And he was the man referred to in the second paragraph of your letter, Exhibit 18?

A. Morris Waldman and Murray Waldman is the same man.

Q. The same man?

A. Yes, that is correct. He went out to California with Louis Staff and took some of the Silberman machines with him.

(Testimony of Henry L. Burkitt.)

Mr. Mockabee: Will you speak louder?

The Court: Read the answer.

(Answer read.)

Q. (By Mr. Leonard Lyon): Who was Staff?

A. A partner of Silberman.

Q. And what did they go to California for, if you know? [1007]

A. They split up, Staff going to California to set up a sort of a division of Cap-Tin of New York and called it Cap-Tin of California.

Q. And what did you base the statement on in your letter, Exhibit 18, in which you say:

“It has come to our attention that you induced one Morris Waldman, a former employee of **Charm** Slide Fastener Corporation, one time known as Cap-Tin Corporation, to leave the employ of Cap-Tin Corporation of California and divulge to you at that time secret information regarding the structure of the machine now disclosed in the above indicated letters patent.”

A. That was information and instructions received from Mr. Silberman himself.

Mr. Leonard Lyon: You may cross examine.

### Cross Examination

Q. (By Mr. Mockabee): Mr. Burkitt, you state that Mr. Waldman and Mr. Staff came to California with Silberman's machines to set up the Cap-Tin branch out here, is that it?

A. That is what I understood it to be.



(Testimony of Henry L. Burkitt.)

Q. Do you know anything about California Slide Fastener Company?

A. I have heard the name but I didn't know the company [1008] except I heard it identified here as the change of name of Cap-Tin of California.

Q. When were those machines brought out to California for the purpose of setting up Cap-Tin operations here?

A. I can't fix the date there except that it came after the Cooper Square business, because not too long after Cooper Square——

Q. What is the Cooper Square business?

A. That was the location of Silberman when he developed the machine of the patent. It wasn't too many months after that that he opened a plant on Broadway, New York, and set up a battery of machines there and then a number of machines were separated out—whether it was within the same year or year after I can't recall, and were shipped out to California and Louie Staff came out to California and he took along with him a toolmaker who was Waldman.

Q. Do you know how long Cap-Tin operated as Cap-Tin in California?      A. No, I don't.

Q. You have no idea?

A. I have had some connection with the operations out here as they moved East again—that is some of the machines moved East again in violation of the Silberman license to Cap-Tin of California, but when the operations out here terminated I have no idea. [1009]

(Testimony of Henry L. Burkitt.)

Q. In your opinion and with your knowledge of the zipper art, wouldn't you say that ratchet feeds for material are old and well-known mechanisms?

A. If you are talking about ratchets and pawls you find them in every mechanical book. [1010]

Q. In developing a new machine such as that of the Geneva gear, isn't it often that that first prototype might be subject to a failure of some kind?

A. First prototypes have that illness.

Q. As a patent lawyer, does it constitute infringement of a patent to show a patented part in an application drawing?

A. You are asking me as to what the conclusion would be in *Conmar vs. Lamar*, if we made such a disclosure?

Q. Yes, I was wondering——

A. I wasn't interested whether the disclosure in the patent application would be so construed. I was interested in what would run through Mr. James' mind, the attorney for *Conmar*. And I had every reason to believe that we were not going to be left alone.

Q. Have you ever heard of a case where a disclosure in a patent drawing has been the basis of any charge of infringement?

A. It could be used as evidence of what was going on in our plant.

Q. You are predicting what would have happened in this particular case. I would like to know if you have ever heard of a case where a

(Testimony of Henry L. Burkitt.)

disclosure in a patent drawing has been the basis of an infringement charge.

A. Never having researched that question directly, I can't say that I did. [1011]

Mr. Mockabee: I think that is all, your Honor.

The Court: Well, are you through?

Mr. Leonard Lyon: That is all. I have another witness.

The Court: All right. I will ask a question. It will be the court's question and either one of you can cross examine.

I looked over the file history in Silberman and read the letter which you wrote to make the Silberman application special. Did you ever bring this contemplated lawsuit that you were talking about?

The Witness: F.L.G. folded up.

The Court: Who was F.L.G.?

The Witness: Three individuals, one of them by the name of Gilman. My next contact with Gilman was Swan Manufacturing Corporation in Boston where Swan was sued.

The Court: Who sued Swan?

The Witness: Silberman did. Talon became a party afterwards, and there was a consent decree and injunction under the Silberman patent.

The Court: Well, I don't know that I understand you yet. What does F.L.G. mean?

The Witness: There were three individuals, they formed a company with their initials.

The Court: Who were they?

(Testimony of Henry L. Burkitt.)

The Witness: F.L. I don't know. Gilman I know was one [1012] of the parties in F.L.G. They folded up a very short time——

The Court: Who folded up—Gilman?

The Witness: F.L.G.

The Court: Who was the third party? You say F.L. and G. stood for three parties.

The Witness: I don't know who F. was or L. was; Gilman I traced down to be the "G." of that combination.

The Court: Who was the person or persons that you were talking about bringing this suit against, F.L.G.?

The Witness: They had a corporation whose name began F.L.G. something.

The Court: In your letter were you also talking about suing this former employee who was guilty of divulging the matter—what was his name, Bert-ram Ross?

The Witness: We were using him as our means of getting the information, which we never got, on the structure of the F.L.G. machine.

The Court: The Silberman patent was issued on March 16, '48. Do you know when F.L.G. folded up?

The Witness: It wasn't too long after the initial investigation by Seltzer and Ross.

The Court: Did it fold up before the Silberman patent was issued, or after?

The Witness: Before.

The Court: I notice you stated in one of the

(Testimony of Henry L. Burkitt.)

documents in [1013] the history, I think it appears at page 102 of Exhibit BL—I was going to say you stated this, but I am not so sure whether you did or not. Just a minute. No, it is a statement by the examiner referring to the highly developed state of the art.

Are you in agreement with that as to slide fasteners?

The Witness: Slide fasteners is a highly developed art.

The Court: All right. That is all.

Any questions, counsel?

Mr. Mockabee: No questions.

Mr. Leonard Lyon: Mr. Doble.

The Court: Step down.

Mr. Leonard Lyon: I have handed copies of the papers that I am about to identify to counsel for the opposing side. I have three charts here. I will ask that the first chart, which is entitled Poux No. 2,078,017, Claim 17, be marked for identification as Plaintiff's Exhibit—

The Clerk: Plaintiff's Exhibit 19 for identification.

(The chart referred to was marked as Plaintiff's Exhibit No. 19 for identification.)

Mr. Leonard Lyon: The next chart, which is entitled Silberman No. 2,437,793, Claim 37, I ask be marked for identification as Plaintiff's Exhibit 20.

The Court: 19 was what—Silberman?

Mr. Leonard Lyon: Poux. Poux Claim 17.



The Court: And 20 is Silberman's '793, Claim 37?

Mr. Leonard Lyon: Yes.

And the third one which I ask be marked Plaintiff's Exhibit 21 for identification is entitled Silberman's '793, Claim 40.

(The charts referred to were marked Plaintiff's Exhibits 20 and 21 for identification.)

WILLIAM A. DOBLE

recalled as a witness in rebuttal, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Leonard Lyon): Mr. Doble, have you studied and are you familiar with the disclosures of the patents which have been introduced here by the defendants, Exhibits E, F, G, H, I, J, K, L, M, N, O, BF, BG, BH, BI, and BJ?

A. Yes, sir.

Q. Have you prepared Exhibits 19, 20 and 21 as evidence to show your findings and conclusions as to the presence in those exhibits of the elements of Claim 17 of the Poux patent in suit, and Claims 37 and 40 of the Silberman patent in suit?

A. Yes, sir.

Q. In explanation of these exhibits you have under the claim title listed the elements called for by those claims? [1015]

A. That is correct.

Q. And at the right under the columns which refer to the individual patent exhibits, you have set forth by a "No" wherein you found that ele-

(Testimony of William A. Doble.)

ment of the claim absent in those references, and by "Yes" you have indicated wherein it is present?

A. Yes, sir, that is correct.

Q. And by the red coloring applied to the legends "No" you have indicated in color the extent to which you find the elements of the claims absent, is that correct? A. That is correct.

Q. And you adopt these Exhibits 19, 20 and 21 as your testimony, and vouch for their correctness as to what they show as indicated just in your previous testimony? A. Yes, sir.

Mr. Leonard Lyon: You may cross examine. I will offer in evidence Exhibits 19, 20, and 21. I am trying to shorten this up just as much as I can, your Honor. I could spend a lot of time on this.

The Court: 19, 20 and 21 received in evidence.

(The charts referred to were received in evidence and marked as Plaintiff's Exhibits 19, 20, and 21.)

The Court: Before cross examination starts, let me ask a question.

Take Exhibit 19 under the name of the Poux patent, the [1016] first section across there reads, "The method of forming separable fasteners," and you have listed "No" under the first four or five patents. Do you mean that those patents concern some other method?

The Witness: Yes, sir, your Honor, some other method, not the Poux method as defined in that particular claim.

The Court: Do you mean it is your opinion,

(Testimony of William A. Doble.)

after looking at the patents, that they don't precisely cover claim 17, is that it?

The Witness: That is correct, your Honor.

The Court: When I first looked at it, I got the impression that you meant that those patents did not concern the method of forming separable fasteners.

The Witness: They may or may not, your Honor.

The Court: By the word "No" there you mean that they are not the equivalent of claim 17?

The Witness: That is correct, they are not the combination in the steps or the method as called for in claim 17.

The Court: All right.

What do you mean by the statement on Exhibit 19, under the columns K and L, referring to patent to Taberlet '253 and to Wintritz '068, that they were "too late?"

The Witness: They were patents that were applied for and issued after the date of the Poux patent '017. That is, they are too late to be a reference to the Poux patent '017. [1017]

The Court: Going to Exhibit 20, your first cross column, which reads, "Slide Fastener Stringer Manufacturing Apparatus, including," where you have listed "No" all the way across, you do not mean that those patents referred to do not concern slide fasteners, but you mean that no one of those patents in your opinion contains the elements of claim 37 of Silberman?

The Witness: That is correct, your Honor.

(Testimony of William A. Doble.)

The Court: The same would be true, then, in that column as to Exhibit 21?

The Witness: Yes, your Honor.

The Court: It is true, then, by just a cursory glance at your Exhibit 21, for instance, that each of the elements, 1 to 8, shown at the left-hand side, are found in at least one or more of the patents cited?

The Witness: Yes, that is——

The Court: Are singly found in one or more?

The Witness: That is correct, your Honor.

The Court: Therefore your chart demonstrates that Silberman is a—I hesitate to use the word—I will put it this way: Silberman is either an aggregation or a combination of old elements, depending on whether or not some new result is achieved?

The Witness: That would be correct, your Honor.

The Court: Is that general statement also true as to Exhibit 20, Silberman claim 37? [1018]

The Witness: Yes.

The Court: Each of the elements singly is found in one or more——

The Witness: No, that is not true. The third element is not found in all of the references cited.

The Court: The third element?

The Witness: Yes, your Honor.

The Court: “and means immediately at that position for performing all operations upon the fed member to form slide fastener elements from

(Testimony of William A. Doble.)

the fed member and to attach the elements to the fed tape directly from the fed member?"

The Witness: That element doesn't stop there, your Honor. It goes on, "the forming means including," and then defines in more specific language what that forming means is to include.

The Court: When you take the breakdown that you included, each element in your breakdown is found singly in one or more of the cited patents?

The Witness: Yes, your Honor.

The Court: So the two columns that you have run the word "No" across as to 3, referring to "and means immediately at that position," and the second horizontal column reading, "the forming means including," where you run "No" across, that again is your conclusion that no one of those patents contains all the elements thereafter set forth?

The Witness: That is correct, your Honor. I notice [1019] there is some of the coloring has been left out in your chart. Some of the "Noes" in the part we put in last night were overlooked. I could add those in to make your chart correspond with the others.

The Court: You can do it at the recess.

The Witness: Could I take it? Because I haven't equipment here to do it, because the colors that I used smeared very easily, and I have to spray it to keep it from being smudged, so if I could take it tonight——

The Court: We are not going to worry about



(Testimony of William A. Doble.)

that. Just take a red pencil. This won't be handled enough to worry about smudging.

So as to 20, then, Exhibit 20, the same statement would be true, that claim 37 of Silberman is either an aggregation or a combination of old elements, depending on whether some new result is accomplished?

The Witness: That is correct, your Honor.

The Court: Would you like to recess now before we start cross examination on this?

Mr. Mockabee: Yes, sir. Though, I hardly think that it is going to give me time. I think without admitting the remainder of the chart, because it would take just an unreasonable length of time to go through all these things on all of these patents, I could point out maybe a couple of the more important ones in my estimation. Because I think to really [1020] digest it and answer it would have to be done possibly in a brief.

Mr. Leonard Lyon: I might say that I handed a copy of this chart, complete, except the last five references, to counsel yesterday morning, so that he wouldn't be caught unawares, and then yesterday he added the five patents, and Mr. Doble completed the chart last night, and I handed him his copy the first thing this morning so he would have a chance to look at it.

Mr. Mockabee: I hardly had much time.

The Court: Do you have further evidence this afternoon?

Mr. Leonard Lyon: No, your Honor.

(Testimony of William A. Doble.)

The Court: Well, I don't know what cross examination will do on this matter. The patents are all in evidence, it is largely a matter of argument. If the witness is wrong in his contention, it would be a matter of argument, pointing out that the evidence shows that patent so-and-so has a certain element or hasn't.

Mr. Mockabee: I don't believe that it would be feasible to try to go through all of them, your Honor, though I would like to probably in the case of—pick out one example in each chart.

The Court: Do you mean now after the recess?

Mr. Mockabee: After the recess, yes.

The Court: All right. You may do that. You can check [1021] these over. I see here is another one. There may be others.

The Witness: Yes.

The Court: We will take a short recess.

(Recess taken.) [1022]

### Cross Examination

Q. (By Mr. Mockabee): Mr. Doble, referring to chart Exhibit 19, which is directed to a comparison of Claim 17, a method claim in the Poux patent in suit and the prior art referred to there, I ask you if you are familiar with Exhibit G, the patent to Smith, '352?

Mr. Mockabee: I don't quite understand the first line of these exhibits.

The Court: We have had that explained. By putting a red no after the word "Claim 17, method

(Testimony of William A. Doble.)

of forming separable fasteners which consist," he means by that "no" he doesn't find all the elements in the particular patent.

The other columns refer to the particular elements. That first column is generally conclusions as to each of these patents.

Q. (By Mr. Mockabee): In line 1 with reference to the patent to Smith, is it not true that Smith forms on a long strip of material a metal fastener member which is generally of "Y" shape?

A. Well, it is not. It has other things besides a Y-shape.

Q. Well, I am speaking of whether or not it does not include that general shape.

A. You are reading the element 1 under Claim 17? [1023]

Q. Yes, with reference to that.

A. You didn't read element 1.

Q. I am not reading element 1.

The Court: He asked you a particular question. Now, listen to the question and answer it.

He has omitted reference to recesses and projections. In substance he is asking if you don't find everything else.

The Witness: No, I don't find the jaws either but——

Mr. Mockabee: Mr. Doble——

The Witness: Points 12 and 14 are generally Y-shaped. I think that is what you asked me.

Q. (By Mr. Mockabee): And the metal fast-

(Testimony of William A. Doble.)

ener members are formed in a long strip, is that not true?

A. Yes, it is a fastener member but it is a different fastener member from the Poux patent.

Mr. Leonard Lyon: If you will just answer the question yes or no and if we require an explanation, all right, we will get along faster.

The Witness: Yes, sir. Now may I have the question, please?

Mr. Leonard Lyon: We can point out in argument if the question is not pertinent, to the item in question, Mr. Doble. You don't have to argue. We will do that.

The Witness: Yes, sir.

(Question read.) [1024]

A. (No answer.)

Q. (By Mr. Mockabee): Doesn't the strip 20 of Figure 2 shows the formation of several individual fastener elements and isn't that strip broken off to show it is an elongated strip?

A. No, I can't agree with that. It is a long strip in the process of forming fasteners, but the fasteners have not been formed until they are cut off of that strip.

Q. But can you not see three elements there in the process of formation? A. Yes.

Q. And part of a long strip? A. Yes.

Q. Have you read in the Smith description that the fasteners shown in the Smith patent may be secured directly to the body of a paper box or car-

(Testimony of William A. Doble.)

rier for the fastener at the point of the severing operation?

A. May I ask where you are reading from the patent, Mr. Mockabee?

Q. I am starting—well, to get the whole sense of it we would have to start on page 2, column 2, line 11 through page 3, column 1, line 4.

Mr. Leonard Lyon: The question is have you read those lines?

The Witness: Yes, I have read the entire patent. [1025]

Q. (By Mr. Mockabee): Well then, that states that as the element is cut off it can be secured directly to a paper carton, is that true?

A. Yes, it so states.

Q. Well now, referring to Defendant's Exhibit H, the patent to Johnson, '667, does that patent not disclose a method of making an attaching slide fastener element? A. Yes, sir.

Q. Does it not teach the formation on a long strip of material interlocking members with recesses and projections and jaws? A. Yes, sir.

Q. Does it not teach placing the jaws astride the edge of a tape? A. Yes, sir.

Q. While integral with the strip?

A. Yes, sir.

Q. And also the closing of the jaws?

A. Yes, sir.

Q. And then the severing of the fastener members from the strip?

A. No. As I read the patent it teaches cutting



(Testimony of William A. Doble.)

a plurality of members from the strip after they are applied to the tape.

It is a block operation where you have a long strip of [1026] elements and they are all simultaneously clamped onto the tape and then the elements are cut—they are cut out from that strip.

Q. In other words, instead of forming elements on a strip and individually or singly and successively severing and attaching them to a tape, under the teaching of Johnson you can secure a number of connected, still connected elements to a tape prior to severing? A. That is correct.

The Court: You answered counsel “yes” to his questions and yet your charts show “no” as to elements 1, 2 and 3.

The Witness: Because he is not forming—if we are referring to Plaintiff’s Exhibit 19, Claim 17, the method of Poux calls for forming on a long strip of material and interlocking members with recessions and projections. That is entirely a different method than taking a preformed strip and applying the whole preformed strip to the tape simultaneously.

This is a unit-by-unit operation as defined in the Poux patent.

Q. (By Mr. Mockabee): Where do you find indications that you have a preformed strip? Does not Johnson teach the forming of elements on a strip?

A. Yes, sir, a plurality of elements, a long strip of them as shown in Figure 6.

(Testimony of William A. Doble.)

Q. In other words he forms a number at one time rather [1027] than just one at a time?

A. That is correct.

Q. And that interlocking member or each of the interlocking members of Johnson is provided with recesses and projections and jaws, is it not?

A. That is correct.

The Court: The jaws on the various elements are all closed at the same time, are they?

The Witness: That is what I believe the teaching of the patent is.

The Court: Or are the jaws closed one by one?

The Witness: I believe they are closed all at one time.

Q. (By Mr. Mockabee): In other words you could take a strip such as formed by Johnson of any length such as say two feet in length, and sever a group from that strip and apply them to the tape before you even disconnect them from each other?

A. I don't think your question is clear.

Q. In other words if you wanted to make a seven-inch zipper——

A. You can clamp them on the tape and then cut them afterwards—that is, taking the whole long strip.

Q. You could put one element on or you could put two on or any number, is that true?

A. That is true but the patent teaches putting the [1028] whole long strip on, as I read the pat-

(Testimony of William A. Doble.)

ent, and then severing them as a gang—it is a gang operation.

Q. You stated——

Mr. Mockabee: Your Honor, I am just picking some examples here and I intend to discuss them further briefly, but I am trying to point out some of the pertinent art. We will therefore proceed to Exhibit 20, the Silberman Claim 37.

Q. (By Mr. Mockabee): I realize, Mr. Doble, that we have each given the other short notice on the prior art and the showing of these charts, but you have testified on the stand regarding Plaintiff's Exhibit 18, Poux '017? A. Yes, sir.

Q. Do you have a copy of that patent?

A. I do.

Q. In the apparatus shown in Poux '017, to illustrate a manner in which the method of Poux might be carried out, is there not shown means for feeding a tape in a fixed path past a predetermined position? A. Yes, there is.

Q. Is means shown for feeding a metallic member toward that position? A. Yes.

Q. And means immediately at that portion for performing all the operations upon the fed member to form slide fastener elements from the fed member and to attach the elements to [1029] the fed tape directly from the fed member?

A. I find that in the Poux patent but that element continues on down. [1030]

Q. You have separate "Noes" to these subdivisions, do you not?

(Testimony of William A. Doble.)

A. That is correct, because element 3 covers a number of—it covers the broad statement, then certain specific detail included in that statement, and if you read that entire statement you see it continues down toward the end of the claim where it reads, “and the cooperating means comprising,” and carries back to the top of element 3, which calls for all of the operations being performed by the ram or the head 14, the ram in the Silberman patent. And that last portion of element 3 reads, “and the cooperating means comprising (a) means for cutting an element from the member.”

Now, the cutting means is carried by the ram in the Silberman patent; it is not carried by the ram in the Poux patent.

The Court: Tell me at this stage how it happens when you drew this chart, Exhibit 20, and compared it with other patents, you didn't compare it with Poux '017.

The Witness: That was an oversight on my part, your Honor. I had the exhibits, and I went by the exhibits that were put in, and Poux wasn't among them, and in the pressure to get this out on time——

The Court: It wasn't intentional?

The Witness: Absolutely not.

Mr. Mockabee: No. I think we were both pressed for time. [1031]

Mr. Leonard Lyon: I think we have had lots of evidence about Poux '017, we all know that, and this was to cover the art that was put in by the

(Testimony of William A. Doble.)

defendant without explanation, other than the brief statements that Mr. Mockabee made.

Mr. Mockabee: Of course, '017 is the patent in suit, to which Mr. Doble testified.

The Witness: Then I was pointing out that the (b) portion of the cooperating means includes, "and for attaching the element to the tape as the legs of the element integrally formed in the member are extended astride the fed tape." That attaching means is operated by the ram in Silberman as defined in the upper portion of element 3, where all of the forming tools are carried by the ram.

Q. (By Mr. Mockabee): Would you say, then, that the elements of claim 37, except for the fact that the cutting means 23 of Poux and its attaching means 28 is possibly carried by another element, is the same as defined in the claim?

A. May I have that read, please?

Mr. Mockabee: I may have gotten mixed up.

(The question was read by the reporter.)

Mr. Mockabee: Is the same as shown in Poux '017?

The Witness: Now may I have that read?

(The question as modified was read by the reporter as follows: "Q. Would you say, then, that the elements of claim 37, [1032] except for the fact that the cutting means 23 of Poux and its attaching means 28 is possibly carried by another element, is the same as shown in Poux '017?")

Mr. Mockabee: Yes.



(Testimony of William A. Doble.)

The Witness: Are you referring to the drawings or specification of Poux, method of Poux?

Mr. Mockabee: I am speaking of the apparatus which is illustrative of a means of carrying out the Poux method.

The Witness: There are things in Poux, as we have all pointed out, that are inoperative to render it a practical commercial structure.

Q. (By Mr. Mockabee): I am not asking your opinion of the practicability of it; I am asking you if those elements are shown in the Poux drawing.

A. Well, to a certain extent you have in the Silberman patent the ram and the operating connection from the ram to those other elements. Now, you do not have that in the Poux patented structure.

Q. Do you have a copy of Defendant's Exhibit E, Sundback's '884?      A. Yes, sir.

The Court: What figure are you going to look at, counsel?

Mr. Mockabee: I was going to refer Figs. 1 on sheet 1 and 3 on sheet 3, primarily. I think, also, a reference to Fig. 4 on sheet 4 would be helpful. [1033]

Q. (By Mr. Mockabee): I notice on Exhibit 20, with reference to Sundback '884, under subdivision 3, "the forming means including (a), (b) and (c), a base, a ram, and means for reciprocating the ram," you have "Yes."

A. Yes, sir.

(Testimony of William A. Doble.)

Q. On subdivision (d), "and cooperating means carried by the ram and the base and actuated entirely by the ram for forming portions of elements in the member including legs at the end of the member," you have "No" opposite that?

A. That is correct. In the Sundback patent '884, as shown in Fig. 20, the elements are cut out of a strip of material, which he calls the metal blank 1, and then they are punched back, shoved back into the strip, and are carried forward to the station where the element is attached to the tape.

Now, in that structure the element is not formed on the end of the metallic strip.

Q. But it is in Poux '017, is that not true?

A. That is true. And in this Sundback '884 there is a tremendous amount of scrap generated in the production of zipper stringers.

Q. Mr. Doble, does the question of whether there is or isn't any scrap have anything to do with the elements that we are referring to? We are determining whether certain elements recited in these charts are shown in these prior patents. [1034]

A. I believe it does; if you look at Fig. 20, the strip extends way beyond the element, and therefore the legs of the element or jaws of the element are not formed on the end of the strip, and that strip has progressed to a chopper-upper, which chops up the scrap. So you have at the end of this——

Q. I think we are getting off the point, Mr. Doble. Do you consider that portion of the strip

(Testimony of William A. Doble.)

from which the element is formed the essential portion of the strip, or is the scrap which is thrown away?

A. Well, they are both important. They both have a bearing on the cost of manufacture of the element.

Q. But what you are trying to do is make some elements out of a strip, aren't you?

A. Certainly you are.

Q. And that portion of the strip from which the elements are formed is the important part of the strip, is it not?

A. No; all of the strip is important.

Q. I am not going to stand here and argue with you about it. I am speaking of the means recited in claim 37 of Silberman. Then you have the feeding means. Reference, you say, is shown in Sundback's '884.

A. Yes, sir.

Q. That is also shown in Poux '017, is it not?

A. Yes, sir, it is. [1035]

Q. And it has means, the cooperating means which is composite, including means for cutting an element from the member, and for attaching the element to the tape as the legs of the element integrally formed in the member are extended astride the fed tape.

Now, is that not shown in Poux '017?

A. No, it is not.

Q. Where do you find the difference? What are rolls 9 for?

A. They are to feed the tape progressively for-

(Testimony of William A. Doble.)

ward during the manufacture of the element, and the position of the element, the legs or jaws of the element astride the tape.

Q. And there is means for cutting an element from the member, the cutter 23, is there not, in Poux?

A. Yes, there is, if you just take that particular element separate from the rest of claim 37, I find that in the Poux patent.

Q. Well, continuing with (b) of that subdivision, "as the legs of the element integrally formed in the member are extended astride the fed tape."

A. Are you speaking of Poux now?

Q. Yes. A. Or '884?

Q. I am speaking of Poux.

A. I pointed out before that that is not found, because [1036] the cutting and the attaching portion of the claim is tied back to the cooperating means, which requires that they are all carried by the ram and the base. And that is not true in Poux.

Q. But the forming means is shown, carried by the base in '884 Sundback, is it not?

A. The forming means carried by the base?

Q. Yes, the clamping jaws.

A. The clamping jaws aren't the forming means.

Q. Pardon me. I beg your pardon. I got off the track on this chart.

The forming means is carried by the ram in Sundback's '884, is it not?

A. Well, part of it is carried by the ram.

Q. The ram and the base, then.

(Testimony of William A. Doble.)

A. That is correct.

Q. And that is what claim 37 of Silberman recites, does it not?      A. Yes.

Q. I now refer to Exhibit 21 relating to claim 40 of Silberman's '793. Item 4 on that chart regarding "means for feeding a tape in a fixed path past the end of the fed strip"; is that not found in Sundback '884?      A. No, it is not.

Q. For what reason? [1037]

A. If you will refer, again, to Fig. 20, the tape 44 is fed past a previously separated element from the metallic strip, and not past the end of the strip itself.

Q. Again, I ask you if the portions of the strip which comprise the elements are not the portions of the strip with which we are concerned, not the scrap.

A. Well, we are concerned with both, but that is the teaching in the '884 patent.

The Court: Well, I don't agree with you. You are being very technical, Mr. Witness, when you make contentions like that on your chart.

The Witness: I don't want to argue with your Honor.

The Court: We are interested in making elements, and not making scrap.

The Witness: That is true, your Honor.

The Court: And, therefore, although I agree with you that the Sundback method is wasteful, I think when we have said that we can forget about



(Testimony of William A. Doble.)

the scrap and then look at the elements that are made.

The Witness: But the element is no longer part of the strip; it has been cut from it. Where in the Silberman patent the element is the forward end of the metallic strip. So you have a different structure that brings about a different operation, different result.

Q. (By Mr. Mockabee): Is it not true, Mr. Doble, that a [1038] claim, which is a combination claim of this type, can read upon structures which may vary considerably in specific appearance and arrangement?

A. Yes, if they operate by the same mode of operation and produce the same result. And that is just the trouble with the '884 patent.

Q. Referring again to section 4 of Exhibit 21, is this tape feeding means not shown in Poux '017?

A. Yes, there is a tape feeding means shown in the Poux patent '017.

Q. For feeding the tape in a fixed path past the end of the fed strip? A. Yes, sir.

Q. Is not Section 5, the ram and the base having complementary means for forming and separating a slide fastener element from the fed strip, shown in Sundback '884?

A. Yes, sir. I have so indicated.

Q. Regarding subdivision 6, is not that structure shown in Sundback '884? A. No, sir.

Q. In what respect does it differ?

A. Because the jaws on the base——

(Testimony of William A. Doble.)

The Court: What picture, what sketch, figure?

The Witness: I guess Fig. 20 will show it as clearly as any. The jaws on the base are those parts numbered 46, the [1039] little triangular parts opposite the legs of the elements to be attached, those are a pair of jaws on the base. They are not located immediately at the position of the separating means. The element is separated way back at the first of the jaws.

Q. (By Mr. Mockabee): That is a distance of five zipper elements, is it not?

A. That is correct.

Q. Do you know approximately how far that is?

A. It might be  $\frac{5}{8}$  of an inch, or thereabouts.

Q. Does Poux '017 show jaws disposed immediately at the position of the separating means, that is, jaw closing means?

A. Yes, sir, it does.

Q. Regarding subdivision 7—

The Court: If we give to those words "immediately at" a technical meaning, then none of these patents comply with that language, because the cutting means in all of them are at least one zipper element away from the jaws. The cutting element is not at the jaws. It has to be at least one element away. So when you say "immediately at," if you give it a technical meaning, that it means at that precise spot, the cutting element isn't there. If you, therefore, say "immediately at" means immediately close to but not right at the particular spot, then,

(Testimony of William A. Doble.)

query — one zipper length, two zipper [1040] lengths, three zipper lengths, or——

Mr. Mockabee: It is our position, your Honor, it is a matter of degree.

The Court: I am merely pointing out that I don't think you can give the words "immediately at" the meaning that would ordinarily adhere to them in any of these patents.

Mr. Mockabee: Yes, sir.

The Court: Unless you had one where the cutter and the jaws were touching each other in some way, and I don't think you could make one work in that manner.

Q. (By Mr. Mockabee): Referring to subdivision 7, Exhibit 21, does not Sundback '884 show the means recited in that subdivision, regarding location on the ram for engaging the jaws to drive them into engagement with the element to close it upon the edge of the tape?

A. No, I don't read that on '884, for this reason: The ram in the '884 patent does not have the cam plates which directly engage the closing jaws to bring about the engagement or the attachment of the element to the tape.

Q. Does the claim——

A. Pardon me. I haven't finished. Nor do those closing elements directly engage the zipper element which is to be attached to the tape. They engage the scrap portion of the strip from which the blanks are made, and do not directly engage the element itself. [1041]

(Testimony of William A. Doble.)

It is a different structure and has certain handicaps in the operation of the machine. It reduces the speed, the accuracy and quality, possible quality of the element.

The Court: Does the specification of '884 show that the jaws engage the scrap?

The Witness: Yes, sir, your Honor.

Q. (By Mr. Mockabee): However, Sundback '884 does show jaw closing members, which are actuated by means on the ram, or by the ram itself, does it not?

A. Not by the ram itself, but by means connected to the ram.

Q. Connecting the ram to the jaw closing members? A. That is correct.

Q. And except for the fact that Poux '017 does not disclose means located on the ram, it does show the closing jaws for engaging the element to close it on the tape, doesn't it?

A. Yes, it includes closing jaws to attach the element to the tape.

Q. Now, we get down to division 8 of Exhibit 21. I refer you to the patent to Taberlet.

The Court: Exhibit K?

Mr. Mockabee: Yes, sir.

Q. (By Mr. Mockabee): Sheet 2, Fig. 2. Does that not show means on the ram, that means being No. 46, with an [1042] oblique cam face for engaging a sliding fastener element holder 45-47, with a cooperating cam face?

A. Yes, it so shows a structure which you have

(Testimony of William A. Doble.)

described, but that is not the mechanism which closes the jaws of the element. [1043]

Q. No, it is not a jaw closer. The element holder, this finger 45-47 assembly is not a jaw closer but it shows a member extending down from the ram with a cam face to engage a slidable member carried by the base to actuate that slidable member, does it not? A. That is correct.

Q. And on sheet 1, Figure 9 of that same patent, sheet 1, Figure 9—— A. Yes.

The Court: It couldn't be sheet 1. It would have to be sheet 3, Figure 9.

Mr. Mockabee: I beg your pardon.

Q. (By Mr. Mockabee): Do you saw jaw closing member 49? A. Yes, sir.

Q. And they actuated by cam levers 52?

A. That is right, a cam lever is shown in Figure 52 and not Figure 9.

Q. That is correct. In other words, Figure 1. In other words in that same machine, while specifically different jaw closing cam means is shown, there is an identical type of cam action shown on another sliding part of Taberlet, isn't that true?

Mr. Leonard Lyon: Identical to what?

Mr. Mockabee: Identical cam action.

Mr. Leonard Lyon: Identical to what? [1044]

Mr. Mockabee: Identical to that claimed in Claim 40 of the Silberman patent.

The Witness: I wouldn't say it is identical. I will say there is a cam action there which comprises a vertical reciprocating part having a cam



(Testimony of William A. Doble.)

surface which engages a complimentary cam surface on a horizontal block.

Q. (By Mr. Mockabee): And the vertical one is carried by the ram and the horizontal one is carried by the base? A. Yes, sir.

Q. And the two cam surfaces are slanted, the cam surfaces as shown in the Silberman patent, is that not true? A. Yes.

Q. I don't mean that the profile is necessarily the same or of the same thickness. A. Yes.

Q. But they are both slanted surfaces for cam action? A. That is correct.

Mr. Mockabee: Your Honor, I would like to leave this now with the right to, of course, discuss it in my brief.

The Court: All right. Do you have any further questions of this witness?

Mr. Leonard Lyon: No. We have no further evidence, your Honor.

The Court: Let me ask the witness this question. You are familiar with the patent Gargon, I take it? [1045]

The Witness: Yes, your Honor, somewhat.

The Court: Do you know the difference between what the court speaks of as a combination and an aggregation?

The Witness: Yes, sir.

The Court: Now, you answered my question that as to Silberman's claims 37 and 40 as shown on charts 20 and 21, that every single element in each

(Testimony of William A. Doble.)

of those claims is found at least singly in one or more of the patents shown?

The Witness: That is correct, your Honor.

The Court: Now, what new results do you contend from Silberman—what new and different results do you content results from Silberman?

The Witness: I would say it is this, your Honor.

First, for the first time in the art you could build an inexpensive machine which would operate at high speed and produce at high speed a commercially satisfactory zipper chain or stringer.

That by the particular arrangement of the punches and dies control is maintained during the manufacture of the zipper element and that control is maintained until the zipper element is securely fastened to the tape.

It is a machine in which the elements are readily timed for operation and maintained in correct time relationship and that is due to operating all of the manufacturing and attaching mechanisms directly from one structure, namely, [1046] ram of the machine.

In summarizing I might say it is an inexpensive machine that maintains complete control during the manufacturing and attaching of the elements so you get reasonable accuracy in attaching the elements to the tape.

It eliminates scrap.

It is extremely fast.

It requires only a single machine whereas the

(Testimony of William A. Doble.)

other methods require two machines and some three machines.

Offhand those are the principal points at which this invention stands out over the art.

The Court: All right, anything further?

Mr. Leonard Lyon: Nothing further, your Honor.

The Court: Does the defendant rest?

Mr. Leonard Lyon: The plaintiff rests, your Honor.

The Court: Now, all we have coming from you, Mr. Mockabee, is some evidence on damage?

Mr. Mockabee: Yes.

The Court: It will have to go over until Tuesday. I have a calendar on Monday.

Mr. Mockabee: Will that be at 9:30 or 10:00 o'clock?

The Court: Well, 10:00 o'clock. How long will you be with this evidence? Do you have any idea?

Mr. Mockabee: I don't think the presentation of it will be very long, your Honor. [1047]

The Court: Are you going to want to argue this matter orally or are you going to want to brief it?

Mr. Leonard Lyon: I would prefer to do what the court wants.

I would like to get these cases over with without briefing, but if the court requires more than can be encompassed in an oral argument I am perfectly willing to file briefs.

If we had some indication from the court at some stage as to what matters you want us to cover in an

argument then I could be prepared or be more intelligent about whether I would want to put it in a brief or in an oral argument.

Mr. Mockabee: Your Honor, I think in view of the fact that I didn't have an expert witness I might prefer to outline it in writing and try to make it as brief a brief as possible. But there are a number of points involved.

I don't particularly care to write a brief but I think that is the best way to present it.

The Court: Well, I will be prepared Tuesday and I think we can rest this pretty shortly, to give you some ideas about what I would like to hear and who I think has the burden of convincing me on various matters.

I have read the depositions. I think I have been over the entire record.

I hesitate to comment now or you will go out over the [1048] weekend and I will be faced with another five days' trial.

Mr. Leonard Lyon: It will be without prejudice.

The Court: Oh, no. I think I will hold my fire until Tuesday and then give you what I think are the issues and probably let you brief at least some parts of it.

The Clerk: Before we adjourn, I think the record should show I returned the five parts of Exhibit 5 which were not put into the record by a specific exhibit number and I think they have been put back into the machine.

The Court: Very well, the record will so show.

I take it it has been stipulated that these ma-

chines in Judge Hall's courtroom may be moved at any time?

Mr. Leonard Lyon: They have left Judge Hall's courtroom. We were afraid he might come back and find them there.

Mr. McCoy: We stipulated, also, your Honor, that the machines may be put back into production by each party and that they may be maintained as necessary for such production.

The Court: All right.

I will tell you what I would like to have you do with these three exhibits, 19, 20 and 21.

I would like to hand them back to you and although you may be crowded for space, I would like to have you put Poux '017 in the exhibit.

Mr. Doble: I will be glad to do that, your Honor.

The Court: Then I think you ought to cross off of this [1049] exhibit this matter which I found confusing and which counsel found confusing. For instance on Exhibit—on the first line of this exhibit, which is your general conclusion that there is no patent and it covers—these were to show elements and that is a general conclusion that has caused concern to both counsel and myself. I questioned you about it and even after questioning you counsel had trouble with it and somebody else will have trouble with it.

It seems to me that the best way to do would be to just draw some line through them to indicate they are not for consideration.

The Witness: Yes.

The Court: It seems to me on 20 that the first



horizontal line and these 2, 4 and 5 come within that category.

The Witness: Yes.

The Court: And on 21 only the first horizontal line comes in that category and on 17 only the first horizontal.

The Witness: Yes. I may have a little trouble taking the color out.

Mr. Leonard Lyon: We can remake them.

The Court: Don't remake them.

The Witness: I could put a line through it.

Mr. Leonard Lyon: Why not black them out? I would prefer to remake them and leave those uncolored and no "yeses" or "noes" on them at all.

The Witness: I might be able to erase them. I can try it.

The Court: Or you can clip a piece of white paper over them.

The Witness: We can cement a piece of paper over them.

The Court: It caused me a little confusion and it is my suggestion you do something about it.

The Witness: Yes, your Honor.

The Court: The witness will be handed back these exhibits.

Now, let us clean this matter up as promptly as we can on Tuesday, Mr. Mockabee.

Mr. Mockabee: Yes, your Honor.

The Court: As a matter of fact I am going to direct that after you spend some time organizing your material over the weekend you have a talk with Mr. Lyon, one or the other and see what ar-

rangements as to stipulations you can come to, if any. We might save some time. Maybe some of this material can be prepared in documentary form.

Mr. Mockabee: All right, your Honor.

The Court: Continued until 10:00 o'clock Tuesday morning, March 15.

(Whereupon, at 4:00 o'clock p.m. a recess was had until 10:00 o'clock a.m., Tuesday, March 15, 1955.) [1051]

March 15, 1955, 10:00 o'clock a.m.

The Clerk: No. 10450-C Civil, Talon, Inc., vs. Union Slide, further trial.

Mr. Leonard Lyon: I am returning to the court Exhibits 19, 20 and 21, the prior art charts prepared by Mr. Doble, with the modifications on the charts as requested by the court. I am also handing to the court a copy of the Ulrich patent, No. 2,221,740, which was referred to in Mr. Burkitt's testimony in connection with the Conmar suit, the patent on the element that he referred to. I ask that it be made a plaintiff exhibit, No. 22.

The Court: Is that number right, Mr. Clerk?

The Clerk: Plaintiff's Exhibit 22, your Honor.

The Court: Plaintiff's Exhibit 22 received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 22.)

Mr. Mockabee: Your Honor, I presented to the clerk a motion for leave to file an amendment to the amended answer and counterclaim, regarding award of attorneys' fees and expenses of litigation.

The Court: Is this an amendment to your prayer or an amendment to the body of it?

Mr. Mockabee: It is an amendment to the prayer, your Honor. The prayer is paragraph 12.

The Court: What is the position of the plaintiff?

Mr. Leonard Lyon: I am not conceding at all that defendant has any right to recover attorneys' fees or expenses of litigation, but I don't suppose I have anything to say about whether he can amend his prayer.

The Court: The motion will be granted. The amendment may be filed.

The Clerk: Is the amendment attached to the motion to be considered as the original amendment, counsel?

Mr. Mockabee: Yes.

The Court: I take it it can be stipulated that this amendment—it is an amendment to the prayer, and it wouldn't require a denial, would it?

Mr. Leonard Lyon: I will so stipulate.

Mr. Mockabee: Yes.

The Court: You are stipulating that a denial is not required in the prayer?

Mr. Leonard Lyon: Yes, your Honor, that it stands denied.

The Court: You want a stipulation that there is a denial, then, to this allegation?

Mr. Leonard Lyon: I don't believe it requires a denial to a prayer.

The Court: I don't think it does, either. What do you want?

Mr. Leonard Lyon: That is what I am stipulat-

ing. I am [1055] not conceding that the prayer should be granted.

The Court: I understand. You are expressing yourself and offering a stipulation that since it is in the prayer it need not be denied?

Mr. Leonard Lyon: Yes, your Honor.

The Court: All right. Is that agreeable, Mr. Mockabee?

Mr. Mockabee: Yes, sir.

In connection with the testimony of Mr. Lipson regarding purchase of an interest in the patent license from Sigmund Loew, the witness has finally found the license and I would like to present it in evidence to be considered along with his testimony as Defendant's Exhibit BM. It is a portion of the entire agreement between Loew and Lipson regarding the conditions under which Lipson and Loew entered into their business venture.

Mr. Leonard Lyon: I would like to examine the document before it is received in evidence.

Mr. Mockabee: This first part is the general business arrangement between them. The license is on the back.

Mr. Leonard Lyon: If the part of this agreement which counsel refers to is to be made of record, I would like to have the whole document made of record, your Honor.

Mr. Mockabee: That is satisfactory.

Mr. Leonard Lyon: I haven't had time to examine it.

The Court: He says he has no objection to that. What is the exhibit number, Mr. Clerk?

The Clerk: Defendant's Exhibit BM, your Honor. Shall I mark it for identification?

The Court: BM.

I understand that Mr. Lyon has indicated that he has no objection if the whole document goes into evidence, is that right, Mr. Lyon?

Mr. Leonard Lyon: I haven't had time to examine it, your Honor. I don't like to take time now. If I could make an objection later.

The Court: Mark it for identification as Exhibit BM.

(The document referred to was marked Defendant's Exhibit BM for identification.)

Mr. Mockabee: I would like to place Mr. Lipson on the stand with regard to his schedule of damages.

The Court: All right.

Mr. Mockabee: Mr. Lipson, will you take the stand?

### PHILIP LIPSON

a witness called by the defendant, having been previously sworn, resumed the stand and testified further as follows:

Mr. Mockabee: I offer a copy of the schedule of damages, your Honor. The original is being sent in at the present time from Beverly Hills and I would like permission to substitute the original for this carbon copy at the present time.

Mr. Leonard Lyon: Is this an offer for identification or in evidence?

Mr. Mockabee: It is offered in evidence as Defendant's Exhibit BN.



(Testimony of Philip Lipson.)

Mr. Leonard Lyon: I object on the ground no proper foundation has been laid.

The Clerk: I have marked it for identification as Defendant's Exhibit BN.

Mr. Mockabee: We are offering it for identification at this time and I will lay the foundation.

The Court: Let me look it over. It may be marked for identification but I don't think the document itself can ever go into evidence.

The witness may be able to testify to some of these [1058] things and other matters which appear upon the books can be shown by the books or by an accountant or by stipulation.

Mr. Mockabee: This schedule, your Honor, was presented to plaintiff's counsel yesterday and no stipulation of any kind was arrived at.

Mr. Leonard Lyon: It was shown to me at 3:30 in the afternoon.

Mr. Lipson and Mr. Mockabee came to my office. I went over it with them and asked them a few questions about it and told them it was totally unacceptable to me, either in toto or as to any item on it.

The Court: Well, let us take attorney fees paid in Schedule 1-A. Can't you stipulate to that?

Mr. Leonard Lyon: I call your Honor's attention to the fact that this is not a schedule or a summary—it doesn't purport to be a summary from the books of the company and doesn't purport to say that these attorney fees were paid.

And in my conversations with these gentlemen I

(Testimony of Philip Lipson.)

find that they are not paid and I don't believe that the books reflect them.

I am entitled to know what the arrangements are with the attorneys as to whether they are to be paid.

The Court: If the obligation was incurred would it make any difference whether the fee was paid or not.

Mr. Leonard Lyon: I don't know that it was incurred and [1059] also——

The Court: What is your answer to that? If an obligation for attorney fees was incurred would it make any difference whether it was paid or not?

Mr. Leonard Lyon: If it is a reasonable obligation, one that the court approves.

The Court: Let us not mix the question up with what the court might find. Mr. Mockabee is present and could testify as to his fee. And probably this witness can testify as to what agreement he had with his attorneys and how much had been paid.

Mr. Leonard Lyon: That is what I think we are entitled to know and I also want to call your Honor's attention to the fact that this lumps the attorney fees that were incurred in connection with the counterclaim as well as the defense of the patent actions.

There is no segregation here between the counterclaim and the patent action.

The Court: Can't you take care of that by stipulation. It would be considered, would it not, that the attorney fees involve the entire action?

Mr. Mockabee: The reaction we got yesterday

(Testimony of Philip Lipson.)

was that no stipulation could be entered into with regard to any of the items on the schedule and we couldn't go any further than that. There was just a rejection of it without any discussion as to a stipulation. [1060]

Mr. Leonard Lyon: My point is, your Honor, these items do not appear on the defendant's books. They have not been paid.

Mr. Mockabee: Yes, they do.

Mr. Leonard Lyon: They have not been paid, they are not segregated between the counterclaim and the patent infringement action, and as I understand it, there is no agreement in writing for these amounts and no bills have been rendered, and I think I am entitled, under those circumstances, to find out what we are really attempted with being charged with.

The Court: Mr. Lipson, did you hire Solomon Kleinman as an attorney?

The Witness: Yes.

The Court: Or did the corporation hire him?

The Witness: Yes.

The Court: Did you hire him before or after this present action was commenced?

The Witness: After.

The Court: The suit was filed on what date?

Mr. Charles Lyon: October 17, 1949, your Honor.

The Court: The action was filed in October 1949; how soon after that did you hire Mr. Kleinman?

(Testimony of Philip Lipson.)

The Witness: A few days later.

The Court: You have listed here under Exhibit BN \$890; have you paid him that amount of money or agreed to pay him that amount of money? [1061]

The Witness: I paid him that amount of money.

The Court: That has actually been paid?

The Witness: Yes.

The Court: I take it as to all these matters of attorneys' fees, they involved both the action and the counterclaim?

The Witness: In some cases, yes, your Honor, like in the case of Mr. Graham; but not in the case of Mr. Fulwider or Mr. Kleinman, or Mr. Mockabee. Mr. Graham was to have taken charge of the counterclaim.

Mr. Mockabee: Actually, your Honor, I think I have been involved in both.

The Court: I would so find.

As to Kleinman, you say you didn't hire him in connection with the counterclaim?

The Witness: No.

The Court: Just in connection with the suit, the action brought against you?

The Witness: Yes, your Honor.

The Court: Did the corporation hire Mr. William J. Graham?

The Witness: Yes, your Honor.

The Court: Before or after October of '49?

The Witness: After October '49.

The Court: Did you have some agreement as to his attorneys' [1062] fees?

(Testimony of Philip Lipson.)

The Witness: I asked him and he told me that he couldn't stipulate, it depends on how much work he puts in there. He said he couldn't tell me in advance approximately how much. He said it all depends what goes into the case.

I found that is true with a number of other attorneys I consulted.

The Court: That is the way lawyers work, in case you haven't found out yet.

The Witness: He told me he would be reasonable.

The Court: What have you paid Mr. Graham?

The Witness: I have bills to that effect. Offhand, without consulting my records, I couldn't say. Some of the bills are due him. I think we owe him about close to \$5,000.

The Court: Where are the bills? Are they here?

The Witness: Yes, I have the bills here.

Mr. Mockabee: Is it in this folder?

The Witness: No; it is on the clip board.

The Court: Can you tell us how much was paid him to date?

The Witness: He shows on the bill the balance, and he has a little mistake in there, because my books show \$700 more paid to him than what he gives us credit for.

There are two bills, one is up to February 28th, the other one is March 9th.

The Court: I have marked a statement from Graham, dated [1063] February 28, '55, Exhibit



(Testimony of Philip Lipson.)

BO for identification. Is that the statement you received from Graham?

(The document referred to was marked Defendant's Exhibit BO for identification.)

The Witness: Yes, your Honor.

The Court: Showing services since February '50 in the sum of \$7,500, and also showing disbursements and showing payments on account, leaving a balance of \$5,964.35?

The Witness: Yes, your Honor.

The Court: That is a bill you received from Mr. Graham?

The Witness: Yes, your Honor.

The Court: Did you say there was a mistake in that bill?

The Witness: Yes; in our books it appears that we paid Mr. Graham \$700 to take care of these two items.

The Court: Take care of the two expense items?

The Witness: Yes, when he came here for the depositions, and it doesn't coincide with this figure.

The Court: So there should be an additional \$750 deducted from the balance due?

The Witness: \$700.

The Court: \$700?

The Witness: Yes.

The Court: All right. I show you a document marked BP for identification; is that a further bill you received from Mr. Graham? [1064]

The Witness: Yes, your Honor.

(Testimony of Philip Lipson.)

(The document referred to was marked Defendant's Exhibit BP for identification.)

The Court: Dated March 9, '55?

The Witness: Yes.

The Court: That was in connection with his trip out here to participate in the trial?

The Witness: Yes, your Honor.

The Court: It shows that he received on account \$350?

The Witness: Yes.

The Court: Balance due, \$538?

The Witness: Yes, your Honor.

The Court: That is correct according to your records?

The Witness: That is correct.

I have an additional bill that I didn't show as an exhibit. It is a hotel bill.

The Court: Is there any objection to the receipt in evidence of BO and BP?

Mr. Leonard Lyon: None, your Honor, with the understanding, if I am correct, your Honor, that these are offered as proof of damages. We are not at this time settling an allowance of attorneys' fees, if attorneys' fees are allowed on either cause of action, at this time.

What we are concerned with now is proof of damages under the defendant's anti-trust counterclaim. [1065]

The Court: They are certainly offered for that purpose. But I take it, also, if the court should be inclined to award attorneys' fees to the defendant,

(Testimony of Philip Lipson.)

that the same type of proof would be something that the court might consider in connection with it.

Mr. Leonard Lyon: But we might have some other proof and other lines of objection and cross examination. That would be a question of reasonable attorneys' fees. We are talking now about damages under the defendant's counterclaim, which is a different matter it seems to me.

The Court: Whether the evidence is admissible or not is entirely a different thing from what the court may do with it. I think I follow your thinking. Your contention is this, that if attorneys' fees were to be allowed as damages, then the criterion would be whether they were necessarily paid and whether they were proximately caused, and so forth. If attorneys' fees are to be allowed under the section allowing attorneys' fees in patent cases, then the question is two-fold: Was there the type of oppression and misconduct, or whatever you want to call it, that the Circuit requires to justify an allowance; and, secondly, what is a reasonable figure?

Is that the point you have in mind?

Mr. Leonard Lyon: Yes, your Honor. And, of course, I think the court understands that I am not conceding that the items referred to in this account are proper damages to be [1066] awarded under the counterclaim in this case.

I take the position that even if these expenses were incurred, as represented in this exhibit for identification, that they are not a proper showing of

(Testimony of Philip Lipson.)

damages that can be recovered under the counterclaim. And the principal case on the subject is in 297 Federal Reporter, a decision of the Second Circuit Court of Appeals, *Strauss vs. Victor Talking Machine Company*, 297 Fed. 791. I have had a photostat made of that decision, a copy for the court, and commencing at page 796 the matter is discussed under attorneys' fees, where in an anti-trust counterclaim in a patent suit there was an attempt to recover the cost of defending the patent action as damages under the counterclaim, and the Second Circuit Court of Appeals rules that that is not a proper showing of damages.

Mr. Mockabee: Your Honor, are we going to argue the law on this question right now?

The Court: I am not passing now on the law.

As a matter of fact, one thought that struck me in the matter from a legal standpoint is this: Since the statute has provided that attorneys' fees may be allowed under certain circumstances, doesn't that indicate that, therefore, attorneys' fees aren't a proper item of damages?

Mr. Leonard Lyon: I was going to make that argument.

Mr. Mockabee: Your Honor, Mr. Lyon mentioned——

The Court: It is a legal problem. [1067]

Mr. Leonard Lyon: Yes.

The Court: Can we take this evidence and meet the legal issue later? Or shall we take time now to try to meet this legal issue?

(Testimony of Philip Lipson.)

Mr. Leonard Lyon: I think for the matter of completing the record the evidence should be taken, but I wanted the record to show that I was not waiving the point that I make, that these expenses are not a showing of damage under the counter-claim.

The Court: Then suppose I reserve to you a motion to strike these various exhibits and this testimony?

Mr. Leonard Lyon: Yes, I would appreciate that.

The Court: In order to preserve your record.

Mr. Leonard Lyon: Yes, your Honor. I would appreciate that.

The Court: All right.

Exhibits BO and BP received in evidence.

(The documents referred to were received in evidence and marked Defendant's Exhibits BO and BP.) [1068]

The Court: Now, Mr. Lipson, you handed me another bill. You handed me a statement from the Biltmore Hotel in the sum of \$67.30. It apparently is expenses of Mr. W. J. Graham when he was out here participating in the trial.

The Witness: Yes, sir.

The Court: And this has been paid by your corporation.

The Witness: That is right, your Honor.

The Court: This will be marked as Exhibit BQ and received in evidence.



(Testimony of Philip Lipson.)

(The document referred to, marked Defendant's Exhibit BQ, was received in evidence.)

The Court: Now, did you later employ, or did your corporation later employ Fulwider & Mattingly?

The Witness: Yes, your Honor, at the suggestion of Mr. Kleinman that we have a patent attorney.

The Court: And they sent you a bill for their services?

The Witness: Yes, your Honor.

The Court: And has that been paid?

The Witness: Yes, with the exception of \$16.99 which remains unpaid yet.

Mr. Mockabee: Speak a little louder.

The Court: How much is unpaid?

The Witness: \$60.99.

The Court: All right. Do you have that bill with you?

The Witness: That is a bill for services rendered in [1069] January and I did not bring that bill along, although it is for entering the books.

The Court: Do you know how much you paid them?

The Witness: With the exception of the \$60.99 every bill was paid to them.

The Court: Do you know how much that amounted to?

The Witness: Offhand I don't remember. I think somewhere around \$1,300.

The Court: Well, you have seen this summary,

(Testimony of Philip Lipson.)

Exhibit BN which was made up by your accountant.

The Witness: Yes, I did.

The Court: I take it this Mr. Green is your accountant?

The Witness: Yes, sir.

The Court: It lists \$1,304.35 as the total bill?

The Witness: Yes, your Honor.

The Court: And that corresponds with the statement you just made of apparently a little over \$1,300?

The Witness: That is right, your Honor.

The Court: Now, Mr. Mockabee, did you employ him as your attorney?

The Witness: Yes, your Honor.

The Court: And what have you agreed to pay Mr. Mockabee?

The Witness: Mr. Mockabee told me the same thing, like every attorney—"How can I tell beforehand how much work there is in it?" He said, "The trial may last a week, it [1070] may last four weeks."

The Court: Has he sent you a bill yet?

Mr. Mockabee: No, sir.

The Witness: We have made an arrangement—

Mr. Leonard Lyon: I wish you would answer the judge's question.

The Court: Has he sent you a bill yet?

The Witness: He was supposed to send me a bill but I didn't get it.

(Testimony of Philip Lipson.)

The Court: Have you discussed with him some figure as to the reasonable value of his services up to the time of the conclusion of this trial?

The Witness: Yes, sir, your Honor. We discussed it yesterday—Saturday, if you please.

The Court: What figure did you arrive at?

The Witness: \$5,000.

The Court: And how much of that have you paid?

The Witness: Just a few hundred. I think six or seven hundred dollars.

Mr. Mockabee: I would say six or seven hundred dollars. It is in the neighborhood of \$700.

I might add, your Honor, I told the defendant that knowing his position I would also give him some help on an appeal because I rather feel that this case will be appealed regardless of which way it goes, and that is to be included in the \$5,000.

The Court: Well, going back to Mr. Graham. Mr. Graham worked on both the suit and the counterclaim, did he not?

The Witness: Yes, your Honor.

The Court: And Messrs. Fulwider & Mattingly took depositions, did they not?

The Witness: Only one deposition. Mr. Fulwider was present when that was taken. The others were taken by Mr. Graham.

The Court: They worked both on the suit and the counterclaim, did they not?

The Witness: No, your Honor. Mr. Fulwider

(Testimony of Philip Lipson.)

had told me that he expected Mr. Graham to take care of the counterclaim and he was in charge of the patent.

Mr. Leonard Lyon: Is Mr. Graham a patent attorney?

The Witness: From what he told me he is.

Mr. Leonard Lyon: Do you know?

The Court: Well, what is a patent attorney?

Mr. Mockabee: Mr. Graham has tried some patent suits.

The Court: That doesn't make any difference. I tried a patent case in the Federal Court and I never claimed to be a patent attorney.

Mr. Leonard Lyon: What I am getting at is whether Mr. Graham was hired to do anything on the patent case or was he hired to handle the anti-trust counterclaim?

The Witness: Originally he was hired to do both. As a [1072] matter of fact the counterclaim didn't come up until 1952. This claim was started in 1949 originally.

Mr. Leonard Lyon: Wasn't very much activity in the case until 1952, was there?

The Witness: Well, I wouldn't be able to tell that because there was some activity but how much is much and how much is little I wouldn't be able to tell you.

The Court: Is there anything further on that? If there is any legal right here so far as I am concerned, all of these things apply both to the complaint and the counterclaim. I don't think you can

(Testimony of Philip Lipson.)

say that you hired an attorney to handle one part of a matter.

Mr. Leonard Lyon: Conceivably there might be a different legal question as to whether the expense of prosecuting a counterclaim were not to be distinguished from the expenses of defending the patent action.

The counterclaim was filed by the defendant and certainly the law does not permit recovery as expenses in the form of damages the prosecuting of the very counterclaim that is sought to be the source of the damages.

Mr. Mockabee: I have a case that holds differently, your Honor.

The Court: Do you want to inquire further on these attorney fees?

Mr. Leonard Lyon: I would like to ask Mr. Lipson who [1073] prepared the counterclaim in this case.

The Witness: Mr. Graham and myself.

Mr. Leonard Lyon: Mr. Fulwider had nothing to do with it?

The Witness: No, the claim was prepared in New York City.

Mr. Leonard Lyon: And Mr. Kleinman had nothing to do with it?

The Witness: No, sir.

The Court: Unless I read the counterclaim incorrectly, the counterclaim is a two-fold proposition. It is both a shield to the patent suit and it is a sword for a recovery. Doesn't the counterclaim



(Testimony of Philip Lipson.)

work both ways. And insofar as the counterclaim is used as a shield against the patent then isn't it strictly a part of the patent suit?

Mr. Leonard Lyon: If it is the basis for a shield in the patent action, your Honor, I would go along with that logic but if it fails of that and has to be treated on its own merits as an antitrust counterclaim it is a different question.

The Court: Maybe you misunderstood me, Mr. Lyon. I said that I thought I would take the position in any event, if we ever reach the question of this problem, that any attorney who worked on this case probably worked, conceivably, both on the patent and the counterclaim end of it.

I don't see that it is going to be possible to say that [1074] one man worked only on the counterclaim and another man worked only on the patent.

Mr. Leonard Lyon: I might ask the question while we are here to clarify the record as to Mr. Mockabee. I understood that he was leaving the counterclaim to Mr. Graham.

Now, he came into the case after the pleadings were all framed, in the last month, and I would like to have a statement as to whether he worked on the counterclaim.

Mr. Mockabee: I worked on both, your Honor. You can't keep away from it.

The Court: He says he worked on both but if he said he worked only on the patent end of the case I can't see where that would give you any solace.

(Testimony of Philip Lipson.)

Mr. Leonard Lyon: It wouldn't help me any but I wanted to establish that he worked on the counterclaim.

The Court: He has admitted he worked on both. Are you going to take his word for that?

Mr. Leonard Lyon: I would like it to appear—the date appear when Mr. Mockabee came into this litigation.

The case was filed in 1949 and I think on the record we should show when he came into the case.

The Court: I think Mr. Mockabee came into the case—well, Mr. Mockabee, you can state that for yourself.

Mr. Mockabee: It was in the last few days of January, as I recall it. [1075]

The Court: 1955?

Mr. Mockabee: Yes, sir. And since that time I have put in up to—up to the time of trial, one month prior to the trial and during the trial, I put in a great deal more than one month's work.

I told Mr. Lipson that if I hadn't told him how much I would do this work for I would have revised my estimate and I wouldn't repeat it for him because of the time I have spent on this thing.

The Court: Are you willing to accept counsel's statement as to when he came into the case?

Mr. Leonard Lyon: Yes, I will.

The Court: And I think both will concede, having come in that late, he has worked day and night on the case.

Mr. Leonard Lyon: That is right. I am not

(Testimony of Philip Lipson.)

trying to minimize Mr. Mockabee's work in the case.

Mr. Mockabee: And I am trying to justify my fee.

Mr. Leonard Lyon: The item of Mr. Graham for \$9,617.34—have you agreed with Mr. Graham—have you a firm agreement with him to pay the unpaid balance of that item?

The Witness: I don't know—what do you call "a firm agreement?"

Mr. Leonard Lyon: An agreement you can't back out of.

The Witness: A written agreement?

Mr. Mockabee: I don't believe the witness has a written [1076] agreement with Mr. Graham.

The Court: You have no contract with him in writing?

The Witness: No, your Honor.

The Court: I think these exhibits tell the story. Mr. Graham has billed this witness.

Mr. Leonard Lyon: He may dispute the bills or may never pay them and charge this account for them in this case.

The Court: That is possible. Let us pause just a moment. These bills do not add up to this \$9,000 or \$10,000 figure shown on Exhibit BN for identification.

Mr. Graham in his first bill wrote, "For services to you since February of 1950, up to but not including the trial, \$7,500."

The second bill says "Services attending the trial

(Testimony of Philip Lipson.)

and conferring with the witness," so the two together make about \$8,000. They don't come up to the \$9,000 figure or the \$10,000 figure referred to in Exhibit BN.

Mr. Mockabee: Your Honor, I believe the auditor who prepared this schedule is here and he can explain that there were some expenses in addition to the fees for services—the charge for services that was incurred by Mr. Graham.

Mr. Leonard Lyon: If there were expenses paid to Mr. Graham we should have the invoices here.

The Witness: Your Honor, may I look at the exhibit. There is some figure there—the way Mr. Graham put it I [1077] find in the first bill that it is \$8,276 total. Now he had forgotten to put in a \$700 item which we paid him.

In the second bill it is \$888 which made a total of \$9,154.

He gives this figure here but then he adds his expenses so this is the total—the first bill and the second bill totals this amount \$9,157.

The Court: I see.

The Witness: On these expenses like this bill, for instance, the hotel bill and other hotel bills.

The Court: Referring to Exhibits BO and BP from Mr. Graham, do you concede you owe him these bills?

The Witness: Yes, your Honor.

Mr. Leonard Lyon: Do you consider you owe and are under obligation to pay Mr. Mockabee the \$5,000 that you have on this statement?

(Testimony of Philip Lipson.)

The Witness: Yes, sir, I do.

Mr. Leonard Lyon: I have no further questions about the item of attorney fees.

The Court: All right. Now, Mr. Lipson, did you make any trips to New York or elsewhere in connection with this lawsuit?

The Witness: Yes, your Honor.

The Court: How many did you make?

The Witness: Three trips, your Honor. [1078]

The Court: This Exhibit BN for identification lists a trip in November of 1950.

The Witness: Yes, I made that trip.

The Court: Who did you confer with on that trip?

The Witness: I conferred with Mr. Graham and I had made an appointment with Mr. McKee to meet him in Erie, Pennsylvania to show him the counterclaim and the amended answer and to try to effect a settlement in the case. Mr. Meech was present at the same meeting.

The Court: All right. What expenses did you incur on that trip for travel, meals and hotels and so forth?

The Witness: \$616.99.

The Court: 59 cents?

The Witness: Yes.

The Court: Did you make a second trip in March of 1953?

The Witness: Yes, your Honor.

The Court: Who did you confer with then?

The Witness: I conferred with Mr. Graham in



(Testimony of Philip Lipson.)

New York and I had a meeting with Mr. Meech in the office of a supplier who tried to bring about a reconciliation.

The Court: What were your expenses on that trip?

The Witness: \$625.80.

The Court: Did you make a third trip?

The Witness: Yes, your Honor. The third trip was in June, 1954. [1079]

The Court: Who did you confer with then?

The Witness: I conferred first with the officers of the Talon Company in Meadville, Pennsylvania and then preparations for proposals in New York City.

The Court: And what was your expense on that trip?

The Witness: \$832. May I state Mrs. Lipson accompanied me as an officer of the corporation in that case.

The Court: Now, on any of these three trips did you also conduct business for your corporation such as contacting accounts, selling zippers?

The Witness: No, we do not sell in the East. Our business is confined to the West Coast.

The Court: Well, did you have any business at all on any of these three trips other than business connected with this lawsuit?

The Witness: I may have called on a few suppliers, although we buy everything by mail.

Mr. Leonard Lyon: Mr. Lipson, on the occasion

(Testimony of Philip Lipson.)

of this trip in June of 1954 you went to Detroit and picked up a car, did you not?

The Witness: That was an excuse that I gave to the Talon Company when I wrote that I wasn't making a trip on purpose. Mr. Meech had asked one time—had asked Mr. Graham that if Mr. Lipson would be in the East he would like to confer with me. [1080]

Mr. Leonard Lyon: But in either case did the Talon Company ask you to make the trip for the purpose of conferring with them—they did not do that on any of these trips, is that right?

The Witness: In two cases, yes. The trip to Erie was made by appointment that I had made with Mr. McKee. [1081]

Q. (By Mr. Leonard Lyon): Who asked for the appointment? A. I did.

Q. In each case? A. Yes.

Q. You haven't answered my question about your trip of June, 1954. The Talon Company asked you not to make the appointment unless you were going to be in the East on other business, did they not?

A. They did not say that. They said that if I went East I should stop in Meadville and they would be glad to arrange a meeting between Mr. Walker, Mr. McKee, and myself, regarding this case.

Q. Didn't you advise Talon Company that you were coming East for other purposes and would just incidentally drop in on them? A. I did.

(Testimony of Philip Lipson.)

Q. And you did have other purposes in making the trip, did you not?

A. I did not go to buy a car for myself, because I didn't buy one.

Q. Did you go to Detroit?

A. Yes, I stopped in Detroit.

Q. What for?

A. I have relatives in Detroit. I have lived there 25 years, and I make a trip East maybe in two or three years, and [1082] naturally I stopped in for a day to see them.

Q. Did you render expense accounts to the Union Slide Fastener, Inc., the corporate defendant, for these amounts? A. Yes, I did.

Q. Did they pay them to you? A. Yes.

Q. Actually paid them? A. That's right.

Q. Can you produce those expense accounts?

A. They are on the books.

Mr. Leonard Lyon: I will reserve the question whether the books should be produced until we see whether we need them or not.

The Court: Did you buy a car for anybody else besides yourself in Detroit?

The Witness: In order to save return plane fare, I brought a car for someone else, and I drove it out here in the heat wave that we had in July, and I saved two hundred some dollars plane fare.

Mr. Leonard Lyon: I have no further questions on the travel expense.

I would like to know some things about the next

series of items, the miscellaneous expenses. They are always a catch-all in an expense account.

The Court: I am not going to sit up here and take testimony [1083] about a bunch of telephone calls that were made, and stenographic expense, and a bill for research. If we are going to go into these things and you gentlemen can't agree on some stipulation, I will appoint a master and let him take care of this matter. I have too much to do to take accountings here. That is about what this amounts to. We would have to find out who these calls were to, and find out where each dollar or five dollar call was made.

Mr. Leonard Lyon: I don't expect your Honor to do that. We should certainly do that out of court. I would say, your Honor, under no theory if you were determining the allowing of attorney's fees would any of the following items be involved. We have the miscellaneous expenses. Passing those for the moment, we have time consumed by Mr. Lipson. Well, that isn't an expense of the corporation as far as this account shows, and he is not an attorney, so he wouldn't be involved in attorneys' fees.

The Court: I am going to take a recess now, and I am going to suggest on the miscellaneous expense items that you sit down and confer and see what kind of stipulation you can arrive at, at least as to what the witness would testify to. As to the time consumed by Lipson, I have serious doubts about that, even if we ever reach this issue.

But it seems to me we ought to be able to get a stipulation as to what he would testify as to the time he put on the various matters concerning [1084] this case. And I haven't any doubt, and I don't think that you do, that he has probably put a lot of time in on it.

Mr. Leonard Lyon: That is right.

The Court: As to Schedule II and II-A, I can't understand this at all. What I am going to ask you to do on that, Mr. Mockabee, is to make an offer of proof—think it over during the recess—of what you expect to prove by either Mr. Lipson or your accountant, and I will entertain an objection to the offer of proof and I will probably sustain it. Because I can't see how you can—maybe when you get through I might take some testimony, but I don't think I am going to take anything on that except an offer of proof.

We will take a short recess.

(Recess taken.)

Mr. Leonard Lyon: On the items listed under "Miscellaneous Expense," your Honor, Mr. Lipson has told me the following, and I will stipulate that he would so testify: The two hundred dollar item he paid to an investigator in New York who was looking for witnesses in this case. The \$500 item he paid Mr. William Wray, whose deposition has been taken in this case, and Mr. Wray testified that he was paid the \$500 for his work in connection with the deposition, if it was work. The re-



maining three items are not on the books of the company, but are estimates.

Mr. Mockabee: I might state, your Honor, the telephone [1085] calls, and accounting, particularly, which was not completed until yesterday, and has not yet been billed, are current, and some of them do not yet appear on the books of the company.

The Court: Would Lipson testify that the telephone calls and telegrams would amount to \$635?

Mr. Mockabee: Yes, sir, that is an estimated amount.

The Court: Is that what he would testify to?

Mr. Leonard Lyon: I don't know how he can testify that they would, except that it is his estimate. And of course I am suspicious of such an estimate.

The Court: And the accounting, I take it, is this accounting we are talking about here?

Mr. Mockabee: Partially, your Honor.

The Court: What else would it be?

Mr. Mockabee: As I understand it, there was some work done by the accountant prior to the preparation of the schedules in connection with the suit.

The Court: But it would be for the purpose of trying to present——

Mr. Mockabee: It would all be lumped together.

The Court: The accounting would be for the purpose of trying to present what damage, if any, Mr. Lipson had suffered?

Mr. Mockabee: That is correct.

Mr. Leonard Lyon: Specifically, it was at least in part [1086] his services in connection with preparing this exhibit.

The Court: Yes, I understand.

Obviously his accounting to pick out attorneys' fees paid and even miscellaneous expenses and travel expense wouldn't be \$200. Somebody could go through the books and pick out matters of that sort in a few minutes.

Mr. Mockabee: I think they spent more than a few minutes, and probably the accountant could testify as to the amount of time he spent.

The Court: What is the office and stenographic expense?

Mr. Mockabee: That Mr. Lipson could testify is time and expense involved in preparation of memoranda, histories of what occurred in the firm, and all related to the suit and its preparation.

The Court: And, Mr. Lyon, will you stipulate that if Mr. Lipson were called, that this is only an estimate, but it concerned those matters?

Mr. Leonard Lyon: That is correct. And no such figure appears actually on the books of the company.

The Court: All right.

Mr. Mockabee: With regard to the Wray expense of \$500, possibly Mr. Lyon misunderstood. I do not believe that Mr. Wray charged that for preparing for the deposition. He charged the company \$500 for expenses involved in attempting

to settle the case. He informed the defendant that he could [1087] settle the case.

Mr. Leonard Lyon: There was no request of the defendant, and the defendant didn't actually have any part—there was no request by the plaintiff for any meeting or any efforts of Mr. Wray, and plaintiff had nothing to do with him.

Mr. Mockabee: The plaintiff didn't hire Mr. Wray; the defendant did.

The Court: Will you stipulate, Mr. Lyon, that Mr. Lipson would testify that the \$500 was paid to Wray on Wray's assurance to him that he could or would attempt to settle the case, and that is what he paid him the money for?

Mr. Leonard Lyon: Yes, I will stipulate to that.

The Court: What stipulation do we have as to Lipson's time?

Mr. Leonard Lyon: I make no stipulation at all, your Honor, as to that, because it seems to me under no circumstances is it a proper item of damage, and of course it is not a proper item of attorneys' fees. And my statement equally applies to Schedule II and Schedule II-A.

The Court: Make your offer of proof on time, Mr. Mockabee.

Mr. Mockabee: Yes. I might point out that these things have been submitted and we think rightfully so, and call attention to a district court case in Oklahoma, the same type of suit, patent infringement suit and a counterclaim for anti-trust violation. That is the case of Kobe vs. Demp-

(Testimony of Philip Lipson.)

sey, 97 Fed. [1088] Supp. 342, decided in 1951. It was affirmed at 198 Fed. (2d) 416, and certiorari was denied at 334 U.S. 837, 73 Supreme Court 46.

In that case the district court held that the filing of the infringement suit by the plaintiff caused the loss of sales, and that defendant could recover his average profits, that he could reasonably have been expected to sell more pumps, which were the product of his company; that the defendant was required to incur expenses for resisting the action and continuing in business, and these expenses would not have occurred except for the plaintiff's acts.

And that is one of the reasons why these things have been submitted, your Honor.

Mr. Lipson, will you take the stand, please?

#### Direct Examination

Q. (By Mr. Mockabee): I refer you to the schedule 1-D, entitled "Time consumed by Philip Lipson on Talon suit." And therein you list three trips to New York, including Erie, Pennsylvania and Meadville, Pennsylvania and conferences with counsel and time spent in court and on conferences during trial with a total of 750 working hours. Did you spend that much time on those trips and conferences?

Mr. Leonard Lyon: I will object to that as leading, your Honor.

Mr. Mockabee: We have the schedule here in front of us, your Honor. I am simply trying to shorten it a little bit.

(Testimony of Philip Lipson.)

Mr. Leonard Lyon: A man can't remember from 1950 on to 1955 as to how many hours he spent on particular matters.

Q. (By Mr. Mockabee): Did you keep track of the time that you spent on the items listed in Schedule 1-D?

The Court: Wait just a minute. Let me have the pending question. We have a question pending and there is an objection. The objection is overruled.

As far as the 1950 matter is concerned, it involves a trip. Any one of us could go back and consider a trip that we took and figure out how many hours we spent on it. That would be no problem. A day book would show you when you left and when you got back. That would be a simple matter to figure. [1090]

With reference to the last three items, conferences with counsel prior to February, 1955, would go all the way back.

The objection is overruled. Did you spend 750 hours? Or is that an estimate?

The Witness: It is an estimate, your Honor.

The Court: Did you keep any record of that time?

The Witness: Roughly. Not accurate records over five and a half years. That would have been keeping a calendar. I have some notations and others I may have missed, but to the best of my knowledge I spent at least that many hours if not more.



(Testimony of Philip Lipson.)

Mr. Leonard Lyon: Has this \$7,500 ever been paid to you by the corporation?

The Witness: No.

Mr. Leonard Lyon: Do any entries in the books of the corporation show the corporation indebted to you in that amount?

The Witness: The corporation pays me a salary and I used this time.

Mr. Leonard Lyon: How much of a salary?

The Witness: At the present time I don't draw any salary at all although I work for the corporation.

Mr. Leonard Lyon: How much were you drawing in 1950? What was your salary then?

The Witness: I believe it was \$100 a week.

Mr. Leonard Lyon: How much?

The Witness: \$100 a week.

Mr. Leonard Lyon: What was your salary in 1953?

The Witness: \$150 a week.

Mr. Leonard Lyon: How many hours in a week in working as far as those rates were concerned?

The Witness: I was supposed to have worked the same as anybody else—40 hours, but I worked 75 to 85 hours a week because the corporation didn't have any funds.

Mr. Leonard Lyon: What was your salary rate in 1954?

The Witness: \$150 a week.

Mr. Leonard Lyon: What was your salary in 1955—what is it now?

(Testimony of Philip Lipson.)

The Witness: Up to February 1st it was \$150 a week. From February 1st I haven't drawn any salary.

Q. (By Mr. Mockabee): Mr. Lipson, do you consider this time as time taken from company business because of the suit? A. Yes, I do.

Q. When you took this time from company business was anything done to replace you?

A. Yes. I had to have some of my men, key men come in on Saturdays and I paid them overtime to be able to consult with them because during the week I was tied up with matters of this suit.

Q. Well then, do you arrive at this basis because of [1092] the value of your time plus the replacement cost?

A. I am actually doing a three-man job in this corporation because the corporation is short of funds as a result of this case.

Q. Do you thing that \$10 an hour reflects the actual worth of your time and duties with the company?

Mr. Leonard Lyon: I object to that, your Honor, on the ground it is incompetent, irrelevant and immaterial, what he thinks reflects what.

The Court: I think a witness's statement as to what his time is worth has some probative value, on the same theory that an owner may testify as to the value of his land.

Now, whether the question is proper or not I don't know. I will sustain the objection to the ques-

(Testimony of Philip Lipson.)

tion. But I will permit him to ask the witness what his time was worth.

Mr. Leonard Lyon: I object to that as irrelevant. The question is what did the corporation suffer as damages and the witness has already testified as to how much they were paying him.

The Court: What were they paying you figured on a hourly basis?

The Witness: Your Honor, I drew from the corporation and I sometimes put back into the corporation as much money as I drew out because the corporation was short of funds.

The fact that I drew \$100 a week was not because I wasn't [1093] worth any more.

The Court: You drew \$150 a week in 1950 for a 40-hour week?

The Witness: Yes, your Honor.

The Court: So your services there were paid to you at the rate of about \$2.50 per hour, is that right?

The Witness: Yes, your Honor.

The Court: And in 1953 it was \$150 a week?

The Witness: Yes, your Honor.

The Court: And what does that figure out?

The Witness: That figures out roughly about \$3.75 an hour.

Q. (By Mr. Mockabee): Mr. Lipson, could you hire someone to do the work you did for the corporation for \$3.75 an hour? A. No.

Mr. Leonard Lyon: I object to that on the ground it is speculative and immaterial what he could have

(Testimony of Philip Lipson.)

done. The question is actually what happened here, if I understand this inquiry.

The Court: Sustained.

Q. (By Mr. Mockabee): Was it necessary for you to pay out money in overtime because of your inability to spend regular working hours in the company business?

Mr. Leonard Lyon: I object to that as immaterial because [1094] there is no showing in this statement of what amounts were actually paid to anybody for overtime.

The Court: Overruled. Was it necessary to pay out overtime?

The Witness: Yes, it was.

The Court: And did you pay overtime?

The Witness: Yes, sir.

The Court: How much did you pay out? Or would that be only a guess?

The Witness: That would have to be a guess unless I could consult my books. I couldn't state exactly. Some weeks it was as high as \$150 and some weeks it was \$75.

At times I had to have three men working on Saturday with me and you have to pay them time and a half for their time. Also the fact that we have a toolmaker who is working in the shop and who gets \$2.75 an hour. The company does not charge for his time \$2.75 an hour but we charge \$6.00 an hour, so the amount that we pay the toolmaker in wages does not reflect always the amount of his value to the business.

(Testimony of Philip Lipson.)

Q. (By Mr. Mockabee): What was the reason for the overtime by the employees of the company?

A. When I was tied up during the week with conferences I had no time to take care of the duties in the shop and I had to consult my key men on Saturday in planning what to do in the manner of certain improvements on the machinery, and [1095] in the manner of putting new gadgets or new fixtures through.

In the manner of consulting, as far as sales programs were concerned. I was the general manager and the engineer and the auditor and the sales-manager and everything.

Mr. Leonard Lyon: I would like to ask a few questions about this time that is scheduled here under Schedule 1-D, your Honor.

70 working hours on the trip in November 5th, 1950. Is that the time that was actually devoted to the conferences in regard to this case or does that include traveling time and all the time you were away?

The Witness: It includes traveling time and it includes conferences.

Mr. Leonard Lyon: How much time did the actual conferences consume?

The Witness: (No answer.)

Mr. Leonard Lyon: How many were there on the occasion of that trip?

The Witness: On that trip there it was, I would say, that there were conferences lasting all day, several days in succession.



(Testimony of Philip Lipson.)

Mr. Leonard Lyon: How many days?

The Witness: There was the preparation of the counterclaim.

Mr. Leonard Lyon: How many days did it take?

The Witness: I believe it was six days the first week I was there. We worked on Saturday too.

Mr. Leonard Lyon: Well, how much would you estimate the hours of a day were put in—seven hours?

The Witness: No, I sometimes worked until 1:00 o'clock midnight.

Mr. Leonard Lyon: I am not asking you what you sometimes did but I am asking you about this particular visit.

The Witness: I couldn't give you the exact number of hours for every single day because I didn't clock in and clock out. I merely worked some days until midnight preparing material for the attorneys to put in the counterclaim. [1097]

Mr. Leonard Lyon: Now, you have conferences with counsel prior to February 1955, 150 hours. Who were you working with?

The Witness: Mr. Mockabee.

Mr. Leonard Lyon: Mr. Mockabee?

The Witness: Yes.

Mr. Leonard Lyon: How many visits did you have with him?

The Witness: I haven't counted the visits, but—

Mr. Leonard Lyon: Where did you get the figure 150 hours?

The Witness: All right. I want to bring this out.

(Testimony of Philip Lipson.)

Here is a 22-page manuscript which I wrote in the form of a letter. We got new counsel who was not acquainted with the history of this case——

Mr. Mockabee: It says prior to February 1955.

Mr. Leonard Lyon: This is prior. This is not anything you did after Mr. Mockabee came in.

You don't have any record of these conferences showing the hours devoted to them and the dates they occurred, and how much and who was present, do you?

The Witness: Well, these conferences——

Mr. Leonard Lyon: Can you answer the question?

Read the question to the witness.

(The question referred to was read by the reporter, as follows: "This is prior. This is not anything you did after Mr. Mockabee came in. You don't have any record of these conferences [1098] showing the hours devoted to them and the dates they occurred, and how much and who was present, do you?")

The Witness: It is rather a long question. I can't understand it. Would you split it up in a few questions?

Mr. Leonard Lyon: You have on Schedule I-D Conferences with Counsel prior to February 1955, 150 working hours.

The Witness: That is correct.

Mr. Leonard Lyon: Have you any record showing the dates of those conferences, who was present, and how much time was devoted to the conferences?

(Testimony of Philip Lipson.)

The Witness: No, I haven't got. These can be gotten from Mr. Graham, Mr. Fulwider, Mr. Kleinman. These are conferences from 1949 to——

Mr. Leonard Lyon: I have nothing further, in view of the answers of the witness, your Honor, on these conferences.

Q. (By Mr. Mockabee): Mr. Lipson, for what reason did you hire counsel in New York City?

A. I inquired about counsel in Los Angeles, and I was told that I cannot get counsel that is acquainted with the zipper art; that it had a long history; that I could get counsel in New York who are acquainted with the zipper art, and who had this information that I needed at their fingertips.

Q. And that was the reason——

A. That was the reason I hired counsel in New York.

Mr. Mockabee: Regarding Schedule II, your Honor, I think [1099] the accountant could better testify to that.

The Court: I am not going to take testimony. I told you, you could make an offer of proof.

Are you through with Mr. Lipson? He will not be involved in II or II-A, will he?

Mr. Mockabee: That first part of II-A refers to salaries actually paid to him and the items salary that should have been paid.

The Court: You make an offer of proof to prove by Mr. Lipson, who is now on the witness stand and has been sworn, that if he were interrogated concerning the matters set forth on Schedule II-A,

(Testimony of Philip Lipson.)

that he would testify that his salary from the defendant Union Slide Fastener, Inc., for the fiscal year ending February 28, 1950, was \$5,200?

Mr. Mockabee: Yes.

The Court: And for each fiscal year ending February 28, '51, '52, '53, '54, and '55, the salary paid by the corporation was \$7,800, making a total salary paid of \$44,200?

Mr. Mockabee: Yes, sir.

The Court: And you offer to prove that if you asked him what his salary should have been in his opinion based upon the amount of work that he did for the corporation, and taking into account his experience and background, he would have testified that for the fiscal year ending February 28, 1950, he should have been paid a salary of \$10,400?

Mr. Mockabee: Yes. [1100]

The Court: For the fiscal year ending February 28, 1951, he should have been paid a salary of \$13,000, and each fiscal year ending February 28, '52, '53, and '54, he should have been paid a salary of \$15,000?

Mr. Mockabee: Yes, sir.

The Court: Is that what you offer to prove?

Mr. Mockabee: Yes, sir.

Mr. Leonard Lyon: I object to the offer of proof, your Honor, on the ground that it is irrelevant, incompetent and immaterial, and testimony of the witness would not prove what the offer states.

The Court: The first part of your objection will be sustained. The objection will be sustained upon

(Testimony of Philip Lipson.)

your first ground. Upon the further ground that this corporation fixed and paid these salaries. What they might have fixed and what they might have paid, and what the employee was worth, are different matters entirely.

Mr. Mockabee: I think he is basing that on the fact that he was running the corporation and he knew the financial condition of the corporation, and he took those salaries at a lesser figure than he would go out and work for somebody else, do that amount of work. He wouldn't work at those duties other than for himself.

The Court: That can be part of the offer of proof, much [1101] in the way you stated it. But the same objection, I take it——

Mr. Leonard Lyon: Same objection.

The Court: Same ruling.

Would the witness also be interrogated as to his wife Edith Lipson?

Mr. Mockabee: I beg your pardon?

The Court: Would the witness also be interrogated with regard to——

Mr. Mockabee: Edith Lipson?

The Court: Yes, his wife.

Mr. Mockabee: Yes.

The Court: And the witness, if interrogated, would testify that she worked for the corporation full time—is that right, Mr. Lipson?

The Witness: Yes. My wife is here, by the way.

Mr. Mockabee: It is not full time, your Honor.

The Court: All right. On a part-time basis, in



(Testimony of Philip Lipson.)

each of the fiscal years ended February 28, 1950, '51, '52, '53, '54 and '55, and that she received no salary, and that based upon Mr. Lipson's knowledge of her services, his experience in the zipper industry, his position as president of the corporation, his entire background, that in his opinion her salary should have been and she was reasonably worth the sum of \$2600 per year for those part-time services?

Mr. Mockabee: Yes, for administrative work.

Mr. Leonard Lyon: The same objection to the offer.

The Court: The same ruling. The objection is sustained.

Would you also call Mrs. Lipson?

Mr. Mockabee: Yes, and she would so testify.

The Court: If she were sworn and called as a witness, she would testify as to what services she rendered for Union Slide in the six fiscal years involved herein that we just talked about; she would describe her part-time services, and she would testify that she received no money for those services, and she would testify that in her opinion her services were worth the sum of \$2600 per year?

Mr. Mockabee: Yes, sir.

Mr. Leonard Lyon: Same objection.

The Court: Sustained.

Mr. Mockabee: Regarding Schedule II, your Honor, Mr. Lester Greene of the firm of Greer and Greene, certified public accountants, would, if called to the stand, testify that the items in Sched-

(Testimony of Philip Lipson.)

ule II regarding estimated net profits that should have been earned is based upon a figure of 10 per cent of the invested and borrowed long-term capital and is a fair return on such investment. And he would also testify that from an inspection of the books of Union Slide Fastener, Inc., the profits and losses shown in Schedule II for the fiscal years ending February 28, 1950, through February 28, 1955, the last year being estimated because the books are not yet [1103] closed, are a true reflection of the profits and/or losses during that period.

The Court: Is that what his testimony would be?

Mr. Mockabee: He would further testify with regard to items on the books, which appear on the books, with regard to the other schedules, your Honor.

The Court: Is that your offer of proof?

Mr. Mockabee: Yes, sir.

Mr. Leonard Lyon: I object to the offer as incompetent, irrelevant and immaterial.

The Court: Of course, the general objection is good and it will be sustained. In addition, there is no causal connection shown, nor can any be shown, between what the loss is on the books for each fiscal year and any activities of the plaintiff in this action. Nor is the estimated earnings any more than a mere estimate based upon 10 per cent of invested capital, which doesn't take into account competition, the competitive conditions in the industry. This is a very competitive industry. We have heard testimony on that already. It doesn't include new

(Testimony of Philip Lipson.)

devices coming out, new companies coming into the field, and such things as the introduction of the Wilzip zipper, or some other zipper that might come in by some other company.

Mr. Mockabee: Of course we maintain, your Honor, that the introduction of the Wilzip zipper was not normal competition, but was the consummation of a threat to do what plaintiff had [1104] done back East, and that is wrecked small companies through the introduction of a cut-price zipper, if defendants and others on the West Coast did not maintain prices.

The Court: All right. The objection to the offer of proof is sustained. You may step down, Mr. Witness.

Mr. Mockabee: Your Honor, yesterday Mr. Lyon said something about not accepting any of these figures, unless there was an independent audit obtained. Now, if he desires that, defendant is perfectly willing to have such an audit conducted.

Mr. Leonard Lyon: I think the burden is on the defendant, and I think the record has been made, your Honor.

Mr. Mockabee: We have submitted an audit, your Honor.

Mr. Leonard Lyon: Maybe counsel refers to the exhibit for identification as an audit, and I submit it is not an audit.

Mr. Mockabee: It is the results of an audit, I would say.

The Clerk: Counsel, what did you want me to do with the original?

Mr. Mockabee: Let's substitute that for the copy the court has. It is the ribbon copy and is more readable.

Mr. Leonard Lyon: The testimony has shown that this document is a long ways from an audit. It has estimates and calculations.

The Court: That is true.

Did we have the name of the accountant in full whose offer of proof you made? [1105]

Mr. Mockabee: Lester Greene.

The Court: Do you rest, Mr. Mockabee?

Mr. Mockabee: Yes.

Mr. Leonard Lyon: Plaintiff rests.

The Court: I will substitute the original for the copy. It is BN, for identification.

Did you get a chance to look at BM yet, Mr. Lyon?

Mr. Leonard Lyon: I have not.

I think I can handle this later, your Honor. If I have any objections, I can point them out later, if that is satisfactory. This is a long document to peruse while the court is waiting.

The Court: Do both sides close their evidence?

Mr. Leonard Lyon: Plaintiff rests.

Mr. Mockabee: May I have an opportunity to present some law on the question of some of these matters in these schedules which have been objected to and the objection sustained?

The Court: No, I am not going to permit you to

do that. I have taken some proof on attorneys' fees and expenses, and time. These other matters are pure speculation. It is highly speculative. From the facts of this case I can't see how loss would be sustained by defendant by virtue of quota agreements entered with other manufacturers.

This man never was subject to a quota agreement.

Mr. Mockabee: No, sir, he was not, your Honor.

The Court: If other manufacturers were subject to quota agreements, then the field was wide open for this man to expand as much as he wanted to.

Mr. Mockabee: The pattern was that eight suits, I believe, were filed against various defendants by plaintiff, and the plaintiff forced settlements, resulting in quota agreements, then he followed with a suit against defendant. Defendant did not submit to the same type of settlement, that is, a quota agreement. He decided he would fight it, and I think it is the direct result of the general plan of action of plaintiff to control the industry. [1107]

The Court: Where is there any causal connection, proximate causal connection between these alleged loss of earnings of the defendant and any acts of the plaintiff?

Mr. Mockabee: The filing of the suit and the requirement that the defendant withdraw a very considerable percentage of his working capital for the defense of this suit.

The Court: Well, you haven't made such showing, counsel.



I shall not burden you with meeting any law on that subject.

Now, have you rested your evidence?

Mr. Mockabee: Yes.

The Court: And has the plaintiff rested their evidence?

Mr. Leonard Lyon: Yes, we rest, your Honor.

The Court: Do you want to discuss this case at all this afternoon or do you want to go home and write briefs on it?

Mr. Leonard Lyon: If your Honor would care to indicate any particular points that you wish counsel to discuss, if Mr. Mockabee would be ready, we might make some progress on them this afternoon.

If he doesn't feel that he desires to go ahead, why, I don't want to press him.

I have several different phases of the case that I am ready to discuss and have some authorities here but if Mr. Mockabee is not prepared, why, I don't want to just hear myself talk. [1108]

Mr. Mockabee: Well, I have some of it prepared, your Honor, but I have been going night and morning, before and after trial during this trial, trying to keep up with the trial itself and I really haven't had an opportunity——

The Court: Well, I think we will recess until 2:00 o'clock and at that time I will give you some of my ideas about this case.

I may make some factual findings. I am not sure that I will, but in any event if I do they are all subject to attack in your memorandums. I will let

you file briefs, but I have in mind such things as this.

I am going to make a finding that this talk about Havekost inventing this machine is out the window. And I think you might argue that if you want to in your briefs.

But you have a pretty hard burden to convince me, in view of the cross examination in that deposition, that he was the inventor.

By the same token I am inclined to think that the machine, Exhibit 5, that we saw in Judge Hall's courtroom is not the machine shown in the Silberman patent.

I will enlarge upon that when I talk about it again.

Now, that doesn't mean that there may not be Silberman patented machines. There is testimony here that Mr. Burkitt saw a machine operate.

I am giving you my tentative views on various of these issues. [1109]

I am inclined to think, for instance, that the contract arrangements that Talon had don't bear the full scrutiny of inspection but whether or not they go far enough to prevent the use of a patent is another thing.

I will mark out some of the issues I want you to discuss and I will expect you to give me some help in your briefs.

Mr. Mockabee: Yes.

Mr. Leonard Lyon: Thank you.

The Clerk: Is it all right if Mr. Leonard Lyon takes Exhibit BN over the noon hour?

The Court: He may take it with him and we will reserve action on putting Exhibit BN into evidence upon convening at 2:00 o'clock.

(Whereupon at 12:00 o'clock noon a recess was had until 2:00 o'clock p.m. of the same day.) [1110]

March 15, 1955, 3:00 O'Clock P.M.

The Court: Before we close the case, I take it that you both looked over the request for interrogatories and the answers thereto of the various parties, and no one wants to offer any more interrogatories in evidence or as part of the record?

Mr. Leonard Lyon: I have no further interrogatories.

Mr. Mockabee: We have both sets of ours in.

The Court: You don't have any of yours.

Mr. Mockabee: I thought Mr. Graham put them in.

The Court: Wait a minute.

Much of the material from yours, the exhibits and so forth, were put in out of the first set, and I think there was one document out of the second set, and there were certain interrogatories and answers specified by number. I think Mr. Graham did that.

Mr. Leonard Lyon: Can we have an understanding, if on briefing either side finds that they desire any further answers, that they can move to add them to the record?

The Court: That is satisfactory.

Will that take care of that?

Mr. Mockabee: Yes, I think it will.

Mr. Leonard Lyon: I have defendant's Exhibit BM which was offered this morning. I have no objection to it.

The Court: It will be received in evidence.

(The document referred to was received in evidence and marked as Defendant's Exhibit BM.)

The Court: I want to sum up what I think tentatively about this case. And so there will be no misunderstanding, in certain instances I am going to make certain findings of fact as of this time, and if counsel wants to contest them they may do so in their briefs, but the ones that I am making I don't think you can seriously contest. In other words, I am not trying to decide anything now except those things that seem to me to be fairly open and shut.

First I want to take up another matter. On this amendment, Mr. Mockabee, which you made, I asked you if it was to the prayer, and you said it was. Now, actually it is numbered as being the last section of your counterclaim and not your prayer, and I take it your intent, from the number—it is numbered 12(e), and the amended answer and counterclaim stops at 12—where the (e) comes from I don't know, but it doesn't fit in at all with the numbering of the prayer.

Mr. Mockabee: The (e) should be left off. It would be on the prayer. The "12" should be left off. It would be section (e) of the prayer.

The Court: Wait a minute. If you put it in, it ought to be in the body of your counterclaim and

it ought to be in your prayer, too, unless you mean it to be a part of paragraph 12 of your counterclaim, where you ask for \$250,000. And I take it [1112] paragraph (a) is a general prayer, then, to treble the damage alleged. It would seem it would belong in as—what did you mean, 12(a)? I am just in doubt.

Mr. Mockabee: I see it is confusing.

It would have to be included in the prayer, also. It could be 12(a), an additional paragraph on 12, as well as a separate and specific prayer.

I don't know whether (b) would cover it, "the full cost of this suit, including reasonable attorneys' fees." That is not limited specifically to attorneys' fees.

The Court: Well, so there won't be any question about it, let's re-number it 13, have the clerk re-number it by interlineation, and call it 13 as the last paragraph of the counterclaim, and stipulate that it also be considered part of the prayer.

Mr. Mockabee: Yes, sir.

Mr. Leonard Lyon: That is agreeable.

The Court: And then stipulate that that allegation, if such it is, in the counterclaim, be denied?

Mr. Leonard Lyon: Yes, your Honor.

The Court: Is that satisfactory?

Mr. Mockabee: Yes.

The Court: All right.

The Clerk: I will change the original, your Honor.

The Court: Now, as to the pleadings, the complaint alleges [1113] a cause of action for infringe-



ment of six different patents, but the pretrial stipulation limited the action to the two patents in suit, Poux '017 and Silberman '793, and the pretrial stipulation also specified the claims in suit.

The amended answer alleges various defenses, including non-infringement and lack of invention, and the patent issues I will comment on later.

Paragraph (i) of the counterclaim is the paragraph which I referred to as the shield, that is, it is an allegation that plaintiff sought to intimidate, harass and discourage competitors, to block and impede the development by others of the manufacture of slide fasteners and the parts of machines and methods, and has imposed upon competitors licenses and agreements, and so forth.

That I will comment on later in more detail.

Strike that out. I will comment on that at this time.

Apparently I flagged all the agreements except the one I am looking for. Possibly counsel can give me the exhibit number of that old contract that went back to about '35, between plaintiff and——

Mr. Charles Lyon: AH is one of them. It is June 1, 1934, between Talon and American Fastener.

The Court: You say it is Exhibit AH?

Mr. Charles Lyon: AH.

The Court: Well, that early one which I have admitted [1114] solely for the purpose of bearing on the question of the intent of Talon during the dates it was in force, as I recall, was a contract which had definite price fixing provisions in it. As

the law stands today, I would consider that contract illegal.

Thereafter, Talon apparently abandoned price fixing provisions in its contracts and went to what might be called "quota provisions." The contracts as I read them had two features that interested me. One was that a quota, which was generally fixed with reference to Talon's production and the production of the other contracting party, so that if the other contracting party had at the time about 25 per cent of Talon's production, the quota was so fixed that royalties began if it exceeded the 25 per cent of the business, plus generally some allowance for growth both by Talon and the competitor. Another feature of the contracts was the fact that in certain instances there was a license to an individual, a company, a competitor of Talon, of the right to use patents in connection with a limited number of machines, the number of machines being specified.

Now, first, as to the quota arrangement. If Talon's purpose was to secure a royalty, you would think that the royalty would start to run immediately upon the cross licensing. But the royalty did not begin to run until such time as the competitor exceeded the quota. And, as I say, the quota was fixed as having generally some relationship between the production [1115] of the competitor and Talon's production.

It seems to me that the agreements are susceptible to the interpretation that Talon was definitely trying to keep competitors down to size, and that

it wasn't Talon's purpose to collect royalties, but to see that competitors did not become any bigger competitors than they were at the time the licensing agreement took place. And those facts, coupled with the fact that very often these agreements resulted following the bringing of a patent action against the competitor by Talon, the settlement of the action and the cross-licensing, would lead me to draw the inference that there probably had been a misuse of the patents on the part of Talon.

Now, that is a tentative conclusion, one which I can be swayed from. There are probably other items that can be picked up out of the agreements that I haven't referred to. And there is, of course, the argument on the other side as to why the agreements were made, and that it was out of Talon's generosity that these competitors were given a license free agreement for the amount of the quota.

However, that would be a tentative view on that proposition.

Paragraph (j) of the counterclaim is the allegation generally that Silberman visited Los Angeles, admitted that his patent would not hold water in court; that he agreed with the defendants, for a valid consideration, to refrain from asserting any [1116] rights under his patent, that they performed, and by reason of the foregoing facts plaintiff is estopped.

I don't think it adds a lot to the case, but I am inclined to believe that Silberman said the things that he is accused of saying. I am inclined to find, generally, Mr. Lipson's testimony trustworthy. He

has not been an extravagant witness. He has made admissions readily when they should be made, and it is my impression that he has generally tried to stick as close to the facts of this case as his memory and passage of time would permit. However, even from his testimony it is obvious that no agreement was entered into between Silberman and Union Slide, Lipson or Loew. There was no acceptance of this agreement. There was an offer made by Silberman. There was no acceptance made. So the agreement never came into force, and I would be inclined to find that there is no estoppel, that there was no real reliance on what Silberman had to say.

That is why I say that my first finding, proposed finding, as to Silberman's admission is probably not too important.

We come down to (k) of the counterclaim, which alleges that McKee, an officer of the plaintiff, came to California and told the defendant that the machines they were using did not infringe, and believing such statements defendant expended a large sum of money in the production of machines and methods, and therefore plaintiff is estopped. [1117]

Now, I am inclined to believe Mr. Lipson that McKee said the things that he is reputed to have said. But I find no estoppel, find no reliance upon McKee's statement constituting any change of position. And this, again, goes back to what I consider the honesty of Mr. Lipson, and that is in response to the court's question he admitted that those expenditures that were made would have been made anyhow whether McKee made that statement or not.



Therefore, I find—all these are tentative. When I say “I find,” counsel will understand me, I am giving you my present slant on the matter. I am inclined to find that there is no estoppel.

I understand the law to be that in a patent infringement case even though the defense of unclean hands is not pleaded, it is available.

If you have any question on that, you can look the authorities up and see whether or not you agree. And if that is true—and I am mentioning this because I have come to the end of the defenses set forth in the answer, and I am about ready to proceed on the counterclaim—if that is true, then in addition to paragraph (i) of the answer on the misuse of patents, I am inclined to think there would be available the equitable defense of lack of equity on the part of plaintiff.

That hinges on whether I am right in my statement of the law that in a patent infringement suit, which is an equitable [1118] proceeding, the defense of unclean hands is available even though not pleaded.

It would be an additional matter for you to consider in connection with (i) of the answer.

Now we come to the counterclaim, and the counterclaim proceeds along as most of these counterclaims do and alleges that the plaintiffs had acquired 75 per cent of the market.

Of course, that is not borne out by the proof. Probably the best that the evidence shows as to plaintiff's acquisition of the market, is somewhere between 20 and 30 per cent at different times. And



the counterclaim refers to written agreements, contains the language concerning misuse of patents that was contained in the answer. It tells how the defendant was a relatively small manufacturer, and plaintiff never validated its patents but brought suits, and so forth, and that it is unreasonably using and asserting its claims under the letters patent against this defendant, who does not infringe them, and so forth.

Then in paragraph 11 it says that these things set forth above are forbidden by Sections 1 and 2 of the Sherman Act, and the said acts have injured defendant in its business by preventing and restricting the sale by defendant of its products, in the sum of \$250,000.

I have just written a decision, while sitting on the Circuit, in *Karseal vs. Richfield*—it is not yet out in [1119] print, but will be in the next few days—where I consider the question as to whether this damage may be alleged generally, and I conclude that the laws says it can. However, the proof must show, if you allege this damage generally, the proof must show causation, must show how plaintiff has been injured by acts.

So even if I found there had been a violation of the Sherman Act, the defendant's case fails entirely on its counterclaim by failing to show any causation between its alleged damage in the sum of \$250,000 and the alleged illegal acts of the plaintiff.

I was looking around for a case to cite for you. I cite one of my own, not because I think it is a

good case, but because I did some work on it and it has the law and the places where you can find the other cases in it. It is *Myers vs. Shell Oil Company*, 96 Fed. Supp. 670. It is pointed out there where the government charges a violation it is not required to show any other damage than the public interest, but a plaintiff, "must show a causal connection between the violations charged and any injury claimed."

Further on the same page, when there is taken up the question of the Robinson-Patman Act and the Clayton Act, there is a statement, which I don't know whether it is correct or not, now that I read this over, but the statement, anyhow, is to the effect that, "On the other hand, the private litigant" under [1120] these Acts, "need not show that the public interest has been adversely affected by the defendants' acts. He need only allege facts from which it can be determined that he has suffered damage by virtue of acts and conduct \* \* \*"

In any event, the law is clear that plaintiff must allege and establish this proximate causation showing his injury, and this is the hurdle on which most plaintiffs in this type of action stumble. They may make a showing of public interest required, but when they get down to the proximate causation of their injury, they often stumble, and that is where the defendant has not sustained its burden of proof on its counterclaim.

Paragraph 12 is a paragraph bringing in the Clayton Act alleging damages, and the citation that I just gave indicates that in both actions, private

actions under the Sherman Act, or under the Robinson-Patman Act or the Clayton Act, a plaintiff must show how he has been proximately injured by the alleged illegal acts. Here the defendant on his counterclaim must so show, and he has not so shown.

I think that this point is so clear that the case does not require any decision on the statute of limitations that has been interposed. And that would be a further problem of considerable interest, because of the uncertainty as to the law. If the defendant wants to pursue this counterclaim theory further, and so indicate to the plaintiff, then I will want the statute of limitations briefed. I haven't even considered that [1121] matter, because the other seems so clear to me.

Going, then, to the questions on the patents themselves.

Incidentally, there is not very much order or reason to these observations.

In a patent case, you have the issues of utility, novelty, or invention, and infringement.

There is no doubt but what all the devices we have been concerned with have utility. We have problems, however, on the question of novelty and invention.

I am inclined to find, and this is one on which there can't be very much dispute, that Havekost did not invent, if anyone invented, the Silberman patent '793.

The machine that Havekost talks about is one that used preformed strips, and therefore if there

was such a machine, it was something that considered the older type of way of making zippers.

We come now to the Poux patent, and I am at a complete loss to know what is the extent of the patent that talks about a method of making zippers, making fasteners, when it shows as an explanation of its method a machine.

If there is law on that subject to clear my thinking, I would like to see it.

Poux talks about a method of making separable fasteners. In the description of his method, the diagram shows a machine.

His language in his claims really talks of a machine. You [1122] can pick out lots of parts of them:

Feeding the rod;

Closing the jaws;

Severing the members from the rod.

Anyhow, I am in a complete state of confusion on what a method patent is in this particular case, aside from the machine that he demonstrates.

The machine shown would not work. I think that is very clear. The indentation, projection, below the rod would keep the rod from moving forward in proper fashion. The cutting device 23 would not work horizontally in an efficient fashion, certainly with the anvil of the type shown opposite.

It is true there could have been modifications to build a different type of anvil, an anvil that would proceed far enough up to even hold one end of the forward element. But it is not shown in the patent.

This cutter 23 and the anvil 25 is constituted to



bring about a shearing result, and not constituted to hold the end pieces 26 while the legs are being fastened to the strip.

The spreader 27 would create a problem, if you would move the cutter 23 into a vertical position.

I am talking now about the machine. Query, whether persons of ordinary mechanical skill, having seen the Poux method and seen the Poux machine, would not have been able to have devised a workable machine. [1123]

Some of the problems that I have mentioned about Poux, a skilled mechanic, I think, could easily have obviated. Take the indentation appearing on the bottom of the rod, by the change of dies, the male and female dies, you would get the indentation on the top of the rod where it would be free from the trouble shown. Since dies were already placed in the die block it wouldn't take a lot of imagination to move a cutting element into a vertical position. You would not get the rounding of the corners as shown by the Poux machine and method. Probably by spacing your cutter and enlarging your key-hole, you could eliminate the spreader, so if your key-hole was larger and the cutting occurred adjacent to, say, the forward edge of the hole, the legs would be formed upon the cutting. But you would have a waste of metal and the matter of the elimination of metal.

Aside from that, I am inclined to think that Poux had something over the prior art. At least Poux pretty much stands alone at making an attempt to combine what was previously preforming



with the fastening operation. Again, I don't think that Poux would be limited to a square or a solid piece of metal. In other words, it would seem to me if Poux were valid, that a person who would put a strip of metal through the machine would be infringing. The size and shape of metal is a variable that could be changed, depending upon the end result that you wanted. [1124]

By the same token, if Poux taught the use of a square or round strip through the machine, I don't think it is any invention for someone to come along and say, "We are going to put a thin rectangular strip through, a flat strip."

That seems to me clearly to be mechanical skill.

At any rate, I have expressed myself as to Poux.

I am concerned with the difference between a method and machine.

Now, turning to Silberman '793. I mentioned the other day that I had some doubt whether or not the Silberman process was ever exemplified to this court. The machine, Exhibit 5, which has been referred to as the Silberman machine, has features that are not found in the patent. It has, one, spring bars on the top, which have to deal with the operation of the ram up and down;

Two, it has a lip on the closing jaw, which was demonstrated to the court as having a very important function, and is not shown in the Silberman patent;

Three, it has an ejector die to prevent the zippers from bunching up. I may be wrong, but I don't

think that that ejector die 5-A is shown in the Silberman patent.

It apparently doesn't have a V-shaped ram, and I am not sure whether Silberman teaches a V-shaped ram, or not. Let me ask. Does Silberman, according to plaintiff's counsel, show a V-shaped ram?

Mr. Leonard Lyon: Yes, your Honor.

The Court: Well, a V-shaped ram doesn't exist in plaintiff's Exhibit 5. We have heard the difficulties of a V-shaped ram. That a V-shaped ram led to heating and definitely limited the production of a machine.

There is on Exhibit 5 a device for spacing the distance between strings of fasteners. Now, that would not necessarily have to be part of the Silberman machine shown in the patent, but it is certainly something that is not shown in the Silberman patent.

Finally, Exhibit 5 has the vacuum chip cleaner necessary for its operation, and the testimony indicates that in the absence of that vacuum operation, cleaning out bits and pieces of metal, that there would be problems in connection with the operation of the machine.

Therefore, I am inclined to conclude that Exhibit 5 is not the Silberman machine shown in the patent.

The only proof we have about a true Silberman machine is Mr. Burkitt's testimony that he saw the Silberman machine, built pursuant to the patent, operate.

I don't question his statement, because I have already found certain facts that are in line with

testimony that he has given, particularly matters concerning Havekost. But I don't think his testimony goes so far as to indicate that he ever saw that machine in continued commercial operation.

He may have seen some test runs on it, and he may have seen it intermittently, but I think the record is devoid of proof that that Silberman machine, built pursuant to the patent, without these other devices which I have referred to, was successfully operated.

Now, the claim is made that this Silberman machine was the first—I am talking now about the machine built strictly to the patent—was the first high speed machine, and it could well have been a high speed machine for short test runs, but with the V-shaped ram and the amount of surface that would have been involved, friction generated, I doubt if it could have been a high speed machine for continuous operation. Certainly the practice carried on by the plaintiff shows that the machines that they did build, used in Ohio, sent to Georgia—maybe I have the states wrong—were the machines like Exhibit 5, in which the V-shape had been eliminated and changes made.

Some of this may have been out of order.

I have commented that Lipson was a witness who could be believed. He is a skilled tool maker, and he has made improvements on the accused machines, and assisted the California Slide Fastener Company.

It is very interesting that some of the improvements that he claims he made, and he contends he

made them without any help from the outside, just working as a mechanic, are some of the [1127] same things that we find on Exhibit 5, but we don't find in the Silberman patent. The lip on the closing jaw, the ejector die, the vacuum cleaner, the spacing device, and so forth.

Lipson claims to hold a license under the Loew patent.

I think the record shows the swearing back of Silberman beyond Loew, so that probably Loew doesn't have much significance in this picture.

But, at any rate, as I read the Loew patent, the only thing new in the Loew patent was the elimination of—I don't mean "new," but the only difference in Loew from Exhibit 5 and from the Silberman patent, and so forth, was the elimination of the means for threading the metal strip through intermittently. And in Loew a device of knurled wheels was eliminated or was, maybe, not in existence at the time, I don't know, and a means providing a sliding section, which was part of the lower die block, and a reciprocating finger, which engaged embryo cavities was used to move the slide fastener forward.

Loew showed, however, something that we don't find in Exhibit 5 or in the Silberman patent. It showed a type of cutting tool which resulted in pointed apexes on the strip, with the result that there came out of the machine a square-shouldered zipper, instead of the round-shouldered zipper that comes out of Exhibit 5, and would come out of, strictly speaking, a machine built to the Silberman



patent. Or the zipper, such as shown by Exhibit AY, which apparently came out of the California Slide [1128] machines which, as I recall, were referred to as Silberman machines.

The exhibit showing the square-shouldered zipper was Exhibit AX.

So that we have a situation where the accused machines operated by the defendant Union Slide Fastener are producing a different result than the machines under the Silberman patent '793, and under the machine Exhibit 5, the improvement on the alleged Silberman device.

Now, that may be a small matter, but if you get a different result, an entirely different result, from the operation of a series of combinations, it is hard for me to see how you have infringed a combination patent, if there is a valid patent.

The difference between aggregation and combination is that combination is patentable, aggregation is not. Combination is patentable, because you get a new result from old elements.

Here I would be inclined to find that the accused machines result in a different result, a square-shouldered zipper. And I am convinced that although there is not a lot of difference between the slide fastener working on a round shoulder and a square shoulder, I think there is some appreciable difference. I examined them closely, and it seems to me that there would be a possibility of getting more slip on the round-shouldered zipper than you would on a zipper with square shoulders. Certainly the square-shouldered zipper or fastener gives the



[1129] appearance of being more secure as it slides over the zippers. So, query, in view of this result whether defendant's machines infringe Silberman's '793.

One final observation, and that is how much invention is shown in Silberman's '793, in view of Poux '017? Even if Poux is a method patent, and if that is some kind of a different patent than a machine patent, it shows a machine—and my mind is pretty open on this question, I could go either way on this—and I seriously wonder how much invention is shown in Silberman after Poux had done what he did for the art.

Now, I don't think the matter of where the dies are spaced, or which die comes first, any of those things, have very much to do with it. Those are only matters of mechanical skill. The elements in Silberman certainly were all old. The plaintiff's expert conceded that every single element in Silberman was found at least singly in some of the prior art. So at best there is some sort of a combination.

Of course, if a new result came from Silberman, namely, the making of a zipper from stock material without pre-forming, and if Poux does not disclose sufficiently that process, maybe Silberman is good. And from what I have said here, Silberman might conceivably be good and still there might not be infringement by defendant's machines, if defendant's machines attain a different result and made a different product than the Silberman machine.

Finally, there is a prayer for attorneys' fees on

the part of the defendant. If I eventually make findings of misuse of patents, of unclean hands, I might be inclined to grant defendant reasonable attorneys' fees. However, I would conduct some further hearing at that time to find out what would be a reasonable attorneys' fees, rather than to probably decide it upon the record that we have made here.

I don't know whether my observations are going to be helpful to you in your briefs, but at least it will give you something to shoot at, and I think some of the issues of this case, some of the brush should be cleared away. I think if you sit down and analyze some of these things, certain of the brush here has been cleared away so that you can get down to what is really involved in this case.

Is there any comment by either side?

Mr. Mockabee: None, your Honor.

Mr. Leonard Lyon: I appreciate your Honor's remarks, because they will be very helpful.

Have you any thoughts as to how immediate the timing of the briefing should be, or any limit that you want to put on the length of the documents? You have posed a considerable number of questions here.

The Court: Well, any time you let counsel brief a patent case you get awfully cold on the record by the time their briefs come in, so I don't know that time will be too important. [1131] Long briefs are hard to read, of course, and the shorter the brief, if it covers the subject, the better brief it is. I think that counsel might well confer, particu-

larly after you have this written up, and see what you want to do about some of these things. For instance, I think that defendant is clearly out on its counterclaim, and I think if a little research is made on some of the cases, you will be convinced of that.

I think that certain of these other issues that I decided could be eliminated. The Havekost matter. You might be able to narrow your briefs down some if some stipulations or concessions are made between you. If you can't, then have at it, take the issues out of this conglomeration of remarks that I have made, and arrange them in logical fashion, and proceed.

I will require the plaintiff to file the opening brief, and also give you the right to close. That means that I think you have a little heavier burden on you on some of these issues than has the defendant. And that will also have the advantage of having your briefs click one point against the other. Where, if I have joint briefs, attorneys are like the farmer who says, "Gee, haw. The whole field has to be plowed anyhow." And you can't fit one section of a brief up against another.

How much time would you want, Mr. Lyon?

Mr. Leonard Lyon: I would like 30 days if we could have it. [1132]

Mr. Mockabee: Could I have an even amount of time to prepare a response?

The Court: All right. 30, 30 and 15.

Mr. Leonard Lyon: Thank you, your Honor.

Mr. Mockabee: Thank you.

The Court: Exhibit AP may be withdrawn and returned to the possession of the defendant, to be produced again in this court, or any other court where it may be needed.

Mr. Mockabee: Yes. Thank you, your Honor.

I talked to Mr. Lyon about that. It will be returned under the same circumstances as the major machines.

Mr. Leonard Lyon: That is satisfactory.

The Court: There is one thing that we didn't do, and it ought to appear somewhere in the record before this case is decided. I know you will want to be cautious in what you have to say, accurate. That is, Mr. Silberman was not called as a witness, nor was his deposition presented by either side. Do you think it would suffice if we merely said that both parties are aware of this, and the fact that he was not called shall not be considered as prejudicial to either side?

Mr. Leonard Lyon: I can assure your Honor that I am told by the plaintiff that he has not been interviewed in connection with this case on behalf of the plaintiff. There was no such thing as interviewing him and deciding that his testimony was [1133] unfavorable. We felt that the court would gain more from Mr. Burkitt's testimony, under the circumstances, than it would from Mr. Silberman.

I am willing to make the stipulation that the court has suggested, if it is satisfactory to counsel. I do think, though—I am aware of the fact that the patent is presumed to be valid, and if Mr. Sil-

berman had any adverse testimony the burden would be on the defendant to produce it.

I might also say, your Honor, that the defendant actually noticed the deposition of Mr. Silberman, notice was served on us in our office on February 5th. His testimony was to be taken in New York on February 25th. Counsel met there, I was not there, and it appeared that no attempt had been made to serve Mr. Silberman until two days before, and the defendant reported it was unable to find him.

Mr. Mockabee: The only knowledge that I have, your Honor, is that we were not able——

Mr. Leonard Lyon: This all appears in the deposition of Mr. Wray, I think.

Mr. Mockabee: ——we were not able to find him for the purpose of the deposition, which was to be taken on the 25th, the same day we took the Wray deposition.

I am willing to make the stipulation.

Of course, I think what should be considered is what is already in the record, and the Conmar decision which was identified by Mr. Burkitt. [1134]

The Court: Well, that is not exactly evidence, what a judge said in another patent case. That is not evidence here.

Are you willing to concede the fact that Silberman was not called is a matter that shall not be used against either party?

Mr. Leonard Lyon: Yes, your Honor.

Mr. Mockabee: I believe so, your Honor.

With regard to the decision that Mr. Burkitt



identified, I think it helps us substantiate our contention that Silberman in '793 merely borrowed from what was already known and produced previously by others.

The Court: All right. Thank you very much.

If I got a little impatient because the trial lasted nine full trial days, very often starting at 9:30 and going to 4:30, you will bear with me.

Mr. Leonard Lyon: We appreciate very much the court's patience during the trial. You didn't evidence any lack of patience that I didn't feel the court was warranted in evidencing.

Mr. Mockabee: I wish to express my appreciation for some of the possible confusion I may have caused, because of the fact that at times I couldn't quite keep up with it in the preparation.

Mr. Leonard Lyon: I think the court has been very helpful in the case, and it has been a pleasure to be here for these nine days. [1135]

The Court: Well, Mr. Lyon, you always ably represent your clients. We didn't hear much from Mr. McCoy, but I know that he would have been just as diligent. Mr. Mockabee had problems. Coming into a case late is not an easy situation.

One other comment. I read this *Strauss vs. Victor Talking Machine Company* decision, 297 Federal Reporter, and I am inclined to think that that is good law. However, it would only be a further buttress to my views on the counterclaim. [1136]

Thursday, August 2, 1956, 9:00 A.M.

The Court: Call the case.

The Clerk: 10450-C Civil, Talon, Inc. vs. Union Slide Fastener. Further trial.

Mr. Leonard Lyon: Ready for plaintiff, your Honor.

Mr. Mockabee: Ready for defendant, your Honor.

The Court: When I set this case at this early hour I anticipated I was going to be trying a tort claims case, give the first week of my vacation to a tort claims case. But then they settled the case, and I didn't advise you gentlemen you wouldn't need to come so early in the morning, but I suppose there is no harm done.

Mr. Leonard Lyon: May I ask your Honor if this is a hearing just to take the testimony of Mr. Graham who is here by circumstance?

I understood this was set for his convenience.

Or is this to be a complete hearing on this matter of fixing the attorneys' fees?

The Court: We can discuss that.

Mr. Charles Lyon: I have four exhibits here, if the Court wants them.

The Court: Number one, I don't know how long the complete proceedings here will take. I will be guided by your convenience. What are your views in the matter? How long [1138] will these proceedings take?

Mr. Leonard Lyon: I am not prepared to say what evidence the other side has in mind producing, but I don't think it should take very long. I understood this hearing was called to meet Mr.

Graham's convenience, and I thought maybe your Honor had in mind that you were only going to take Mr. Graham's testimony this morning.

The Court: That wasn't my intention. My intention was today or tomorrow to take all the testimony that pertained to this issue.

Mr. Mockabee: Yes, your memorandum indicated that you wanted further testimony with regard to attorneys' fees, and I arranged to have it at this time because Mr. Graham was on the West Coast at this time.

The Court: First, the case is reopened for the receipt in evidence of certain exhibits.

Mr. Leonard Lyon: We have received no motion, your Honor, to that effect.

The Court: No motion for what?

Mr. Leonard Lyon: I thought your Honor indicated that counsel should file a motion.

The Court: I didn't so intend.

Mr. Mockabee: Your memorandum didn't state that.

The Court: No motion is necessary.

I think I am entitled to have in the record [1139] matters which might be pertinent to the issues of this case.

Are you addressing yourself now to the matter of receiving these other exhibits?

Mr. Leonard Lyon: I was addressing myself to the reopening of the case for further proofs.

The Court: Do you want to be heard on that?

Mr. Leonard Lyon: I am just raising the point that the defendant has not moved for such relief.

The Court: I indicated in my memorandum that I was going to reopen the case. I don't know that there is any doubt but what the Court has power to reopen the case on its own motion.

Mr. Leonard Lyon: I understand the Court functions as an umpire in a case of this kind; not as a prosecutor.

The Court: It is true the Court functions as an umpire, but the Court doesn't act in a vacuum, and if the Court feels that certain evidence should properly be in the record, I think the Court has the power to have it in the record.

If you want to be heard on the question of whether the case should be reopened, you may be heard on that issue.

Mr. Leonard Lyon: I think the record is clear, your Honor.

The Court: You don't care to present anything further on that question? [1140]

Mr. Leonard Lyon: I have stated my position.

The Court: All right. The case is reopened for the purposes indicated in the Court's memorandum.

Mr. Mockabee: Your Honor, in accordance with the statement on page 20 of your memorandum regarding patents which were referred to in the file wrapper of Silberman '793 not in evidence, I wish to present soft copies of Legat '726, Ulrich '075 and '884, and Prentice '712, as Defendant's Exhibits BT——

The Court: Just a minute. Mr. Clerk, is BT the next number?

The Clerk: It is, your Honor.

The Court: All right. Legat '726 will be Exhibit BT. Are you offering it in evidence?

Mr. Mockabee: Yes, sir.

Mr. Leonard Lyon: If your Honor please, this is a matter that I had in mind when I stated I understood your Honor to indicate that the defendant should file a further pleading. At the bottom of page 19 of your memorandum in this case you state:

“However, an amendment should be permitted to defendant to plead such of the above matters as the Court indicates as valid defenses, as defenses in the answer. The case is reopened for that purpose. Amended pleadings to be filed within 20 days.”

There have been no amended pleadings tendered.

The Court: Those are pleadings to conform to proof. They don't involve the issue of these patents.

I take it that the amended pleadings are going to be filed.

Mr. Mockabee: They will be within the time specified, your Honor.

The Court: These patents that are being offered now go to the question of prior art.

The reopening for the purpose of the amended pleading is in the nature of a motion to conform to proof, and out of an abundance of caution to have in the Answer certain defenses which were in issue in the trial of this case.

The record will show there was discussion, for instance, as to whether the defense of unclean hands had to be pleaded in an Answer, and I think you, Mr. Lyon—I may not be able to turn to the



place in the record—either stated or joined in a statement that it wasn't necessary to have it pleaded.

Mr. Leonard Lyon: I don't believe it is.

The Court: Out of an abundance of caution, I would like to have it pleaded, and I have requested as one of the things that I have in mind, that the pleadings be amended to conform to proof and to include any defense set up as defenses in the Answer. [1142]

Mr. Leonard Lyon: The reason I say I don't think it is, is because the Circuit Court of Appeals sustained an objection of misuse of patents in a case I had which went to the Supreme Court, after the judgment in favor of the patent had been affirmed by the Circuit Court of Appeals, and on rehearing, and there never was any pleading in the case raising the point, and that point was raised before them.

The Court: It may be proper, but it doesn't seem to me that that is the proper posture to leave a case in.

Mr. Leonard Lyon: I am not questioning the propriety of the matter; I was just indicating, your Honor, that you said there should be a further pleading here, and if we are going into those matters I think it would look strange in the record if you had directed a pleading and then there was no pleading on the matter.

The Court: Yes, I think it would. But I understand the pleading will be filed.

Mr. Mockabee: Your Honor, I think it might

clarify it for Mr. Lyon, that the remark on page 19 regarding reopening for the purpose of receiving the pleading states that it is within 20 days. Then at the bottom of page 20 is the reference to reopening of the case for the taking of additional evidence with regard to attorneys' fees.

The Court: The matter has to be read together. There were three items. One was at the bottom of 19, the amended [1143] pleadings; at the top of page 20 was the reopening for the purpose of receiving the four patents; and at the bottom of page 20 was the reopening for the purpose of taking evidence on attorneys' fees.

In one sense it is one reopening. In another sense it is a reopening to take further evidence on the two issues, namely, these patents and attorneys' fees, and it is a reopening for the purpose of permitting the amendment to conform to proof.

Mr. Leonard Lyon: As to the first item, reopening and receiving in evidence the patents that are referred to here, the three patents, I don't understand why we have any further proceedings on that, because I thought your Honor's order and opinion were self-executory.

The Court: They might be, but I think, again, it would be better practice to give them exhibit numbers.

Mr. Leonard Lyon: All right.

The Court: Legat will be marked BT for identification.

(The exhibit referred to was marked as Defendant's Exhibit BT for identification.)

The Court: Is it offered in evidence?

Mr. Mockabee: Yes, sir.

The Court: BT received in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BT.)

The Court: Ulrich '075 will be BU.

(The exhibit referred to was marked as Defendant's Exhibit BU for identification.)

The Court: Is BU offered in evidence?

Mr. Mockabee: Yes, your Honor.

The Court: Received.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BU.)

The Court: Ulrich '884 is BV. Is that offered?

Mr. Mockabee: Yes.

The Court: Received in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BV.)

The Court: Prentice '712 will be BW.

(The exhibit referred to was marked as Defendant's Exhibit BW for identification.)

Mr. Mockabee: That is offered in evidence.

The Court: BW is received in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BW.)

The Court: Does either side have any further exhibits?

Mr. Mockabee: Your Honor, right at this point I would like, if there is no objection on the part of the plaintiff, to introduce one other patent which I think will be proper in the record in this case.

It is one that was in the [1145] possession of defendant's president and misplaced, and he has just discovered it. It is a patent on method of cutting staples. I only have one copy of the patent, so I can't furnish a copy to plaintiff at this time.

The Court: What is the name of the patent?

Mr. Mockabee: Thayer No. 322997, July 28, 1885. It is for a method of cutting staples.

Mr. Leonard Lyon: If your Honor please, can I be heard with regard to all of these patents that are being received in evidence on the reopening.

As to the three patents that the Court has assigned exhibit numbers to, I would like it understood that those are received in evidence subject to the objections that were made to their consideration in our briefs in this case, without the necessity of repeating the objections here.

The Court: What were those objections?

Mr. Leonard Lyon: Those objections were that they were not pleaded within the rule, and no excuse or showing made as to why they should be received in evidence contrary to the statute providing that the opposing party should have 30 days' notice of patents to be used at a trial.

The Court: I recall no objection of that kind made in the briefs. The objection in the briefs was that they weren't part of the record.

Mr. Leonard Lyon: That is right. [1146]

The Court: Part of the record made at the trial. And when I asked whether these were offered in evidence, I heard no objection from you.

Mr. Leonard Lyon: I was waiting until your



Honor finished, and then counsel started talking. I didn't was to interrupt the Court.

The Court: Ordinarily the proper place to make an objection to an exhibit is when it is offered in evidence. I asked is BT offered in evidence.

But if you have an objection, Mr. Lyon, you may state it.

This is an objection to BT, BU, BV, and BW; is that right?

Mr. Leonard Lyon: Yes, sir.

The Court: What is your objection?

Mr. Leonard Lyon: Under the statute we are entitled to 30 days' notice prior to the trial of the intention of the defendant to rely on these patents at the trial. If the defendant is to be relieved of that requirement of notice, he must give a satisfactory reason why he did not plead the items, such as newly discovered evidence, or some excuse.

There has been no excuse tendered in this case at all as to why the defendant should be relieved of the requirements of pleading imposed by the statute, and on that ground we object to their consideration. [1147]

The Court: What is your answer to that objection, Mr. Graham and Mr. Mockabee?

Mr. Mockabee: Your Honor, with regard to notice, they were all set forth in defendant's answers to interrogatories quite a while before trial in the list of prior art.

Mr. Charles Lyon: So there may be no confusion on that, when you say "they" you were talking about Legat, Ulrich, and Prentice, but you are



not talking about Thayer, which you are proceeding to offer now; is that correct?

Mr. Mockabee: I am talking about the four which have been received in evidence.

Mr. Leonard Lyon: I am informed that these three patents——

The Court: There are four so far.

Mr. Leonard Lyon: I am trying to distinguish between the Thayer patent and the other three.

The Court: There are four other patents, Mr. Lyon. Let's get that straight. There is Legat '726, there is Ulrich '075, and there is Ulrich '884, and there is Prentice '712.

Mr. Leonard Lyon: I see. Four patents.

I understand that those four patents were cited by the Patent Office in the file wrapper of the Silberman patent; and having been advised of that, why, I no longer press my objection. [1148]

The Court: All right.

We have disposed of BU, BT, BV, and BW.

Mr. Leonard Lyon: As to Thayer, I do urge my objection, unless counsel can qualify under the statute that I referred to.

The Court: What is your answer to that, Mr. Mockabee?

Mr. Mockabee: There was no notice of this Thayer patent, your Honor. It is one that apparently was collected early in an investigation of the prior art, and defendant's president, Mr. Lipson, mentioned it to me, but didn't know the identity of it, and he couldn't find it.

He thought Mr. Graham had it, and he thought

Mr. Kleinman might have had it, and just about three days ago in cleaning out some shelves in his front office he ran across the Thayer patent.

The Court: Does this rule require that notice be given prior to the commencement of the trial, or prior to the time it is to be received in evidence?

Mr. Leonard Lyon: I think the statute refers to prior to the receipt in evidence.

Mr. Charles Lyon: No, it is prior to trial.

Mr. Leonard Lyon: But I think it has been construed that it is complied with if you have the equivalent notice before the patent is received in evidence.

The Court: If the defendants feel this is important, we will adjourn the trial for 30 days and give Mr. Leonard Lyon a chance to look this patent over.

Mr. Leonard Lyon: I don't know what the patent is about. I have never seen it.

The Court: I don't either. You have objected to it. I take it that if you objected, you felt there was some merit to your objection.

Mr. Leonard Lyon: I am objecting to it out of an abundance of caution. I don't know what it is and why it is being offered.

The Court: Let me see it.

Mr. Mockabee: I am sorry I don't have another copy of it. I just received it last night.

The Court: What does this add to the prior art?

Mr. Mockabee: It is in some way similar to the early Smith patent on the box fastener, the exhibit number I do not recall now. The Smith goes a lit-

tle further than the Thayer patent, in that it teaches the attachment of the fastener at the time it is severed from the strip, but the Thayer shows an element which is more of the shape of an ordinary zipper element than does the patent to Smith, and it shows the formation of the element while integral with the fed strip and its detachment at the time of final completion.

Mr. Leonard Lyon: I am only pressing the objection because I assume that the defendant will urge that this [1150] patent has relevancy to the case.

Personally, I don't see where it is anything but cumulative to other items that are in the record.

Mr. Mockabee: It shows one of the major features of the alleged Poux method to be much older than any evidence had previously shown, and it shows it, I think, in the formation of a general U or V shaped element from a continuous strip of stock and maintaining it integral, as I have just stated, in a manner which is in many respects as good as that of any of the prior art.

I made a comparison between that and Smith. Smith has certain advantages over Thayer, Thayer has the advantage that it is forming an element much more similar to that of the present day zipper element.

The Court: There is no argument about forming elements. That is such an elemental thing that it doesn't seem to me there is any materiality there. I think the objection is supertechnical. It could be obviated by continuing the trial for a 30 day pe-

riod, but I am going to assign the number BX to the patent and sustain the objection.

Thayer will be BX, and the objection is sustained.

(The exhibit referred to was marked as Defendant's Exhibit BX for identification.)

The Court: Does either side have any further prior art patents that they want to put in this record? [1151]

Mr. Leonard Lyon: Plaintiff has none, your Honor.

Mr. Mockabee: No, your Honor.

The Court: All right.

Are we ready to proceed on the matter of attorneys' fees?

Mr. Mockabee: Yes, sir.

The Court's memorandum apparently cites the ruling law on the question of attorneys' fees in this Circuit. The Park-In-Theatres case, the Day Brite case, the Shingle Product Patents case.

The Court: That is not necessarily all the law in this Circuit on it. They just happen to be cases that I was in and am familiar with.

Mr. Mockabee: I meant to say that it reflects the ruling law.

The Court: I was reversed in two of them, by the way.

Mr. Mockabee: But the principle of the award is stated.

The Court: I don't know.

Were you in one of those cases, Mr. Lyon?

Mr. Leonard Lyon: I was not in it personally at



that stage, but our firm was in the Park-In-Theatres case.

The Court: I gave you attorney's fees, didn't I?

Mr. Leonard Lyon: I don't remember. You granted a summary judgment, I think.

The Court: You were the prevailing party, weren't you? [1152]

Mr. Leonard Lyon: No. We were for the patent in that case. Judge Harrison owned one of the theatres out here and he was much concerned about that patent, I remember.

The Court: It shows what an honorable man he is. He never intimated by even a grunt that he had an interest in one of those theatres. I never knew that.

Mr. Leonard Lyon: There is no question about that.

Mr. Mockabee: I might add another Ninth Circuit case in 1954. Filtex Corporation versus Atiyeh. That is in 103 U. S. Patents Quarterly 197.

The same principle laid down in those cases, which provides for the award of attorneys' fees, is also followed in other jurisdictions, as in Pennsylvania Crusher Co. vs. Bethlehem Steel Co., Third Circuit, 193 Fed. 2d 445, and Laufenberg vs. Goldblatt Brothers, Seventh Circuit, 187 Fed. 2d 823, 825.

The Court: There is no use citing these authorities—you referred to this Filtex case, you say that is a Ninth Circuit case?

Mr. Mockabee: Yes.

The Court: Citing these Patent Quarterly cita-



tions to District Judges is very little help, counsel. We don't have that set anywhere in this building that I know of, and if there are citations in the Official reports, they are more useful. [1153]

Mr. Mockabee: I will correct that citation, your Honor, but for your information in the future, there is a set of Patent Quarterlies in the Law Library.

The Court: I have learned something then.

On this matter of attorneys' fees, I take it that the objection you make to the introduction of these additional patents does not pertain to this reopening for consideration of the question of attorneys' fees?

Mr. Leonard Lyon: That is correct, your Honor.

The Court: But if I recall, at the trial you suggested or agreed that if there were going to be attorneys' fees awarded, that the Court take additional evidence.

Mr. Leonard Lyon: I think, if your Honor remembers, Mr. Lipson produced a schedule and some bills, and he was cross examined, and as a result of his testimony it was indicated that if a reasonable attorneys' fee was awarded in this case, there would be a further hearing on what that attorneys' fee was.

The Court: That is my recollection.

Mr. Leonard Lyon: I would like to make this statement: While we are not conceding the Court is correct in awarding an attorney's fee, that for the purpose of this hearing we assume that that has been done, and we will proceed, and I am per-

fectly willing to cooperate in determining what a reasonable attorneys' fee is. [1154]

I am embarrassed to even be put in the position of questioning another attorney who tries to set his fee, but I have got to satisfy my client that we are proceeding in accordance with the law, and I am quite sure we will.

I am sure the Court has fixed attorneys' fees in a good many cases, and it doesn't seem to me that it should take us a great deal of time, or that we should be very technical about it.

The Court: I just wanted to make the record clear as to your position in this matter, and I think you have accurately stated it.

It is my recollection that we all understood that if attorneys' fees were awarded there would be this further hearing.

Mr. Leonard Lyon: That is correct.

Mr. Mockabee: I would like to make just a few remarks here, your Honor.

Plaintiff originally brought suit on six patents. It is true that four of those patents were withdrawn, but it was a considerable time after the filing of the complaint, and in preparing a defense Mr. Graham, of course, found it necessary to prepare his defense with regard to all six patents.

The Court: It might also be added that there were more claims in these patents than they actually went to trial [1155] on.

Mr. Mockabee: Yes. Four of these six patents were withdrawn from issue at about the time of the pretrial hearing.

I would like to make that point because plaintiff's counsel has objected to the award of any attorneys' fees to Mr. Graham, on the ground that Mr. Graham allegedly was primarily involved in the preparation of the counterclaim angle of the case.

The fact remains, and I think the Court observed during the trial, that the evidence with regard to defendant's counterclaim was also a matter of defense in the patent suit.

Mr. Graham was in the case from its inception. He is not—as he said, “I am not a registered patent attorney, I don't get patents for people.”

Mr. Charles Lyon: Mr. Mockabee, may I recall that this case was on file for two years before Mr. Lipson hired a patent attorney. At least he so informed me, and Mr. Kleinman so informed me. So I don't think it is correct for you to be making the statement that Mr. Graham was in the case from the beginning.

Mr. Mockabee: Apparently he was in the case as an attorney for the first time before anybody else was, but I will let Mr. Graham give his remarks.

The Court: This is just sort of an opening statement? [1156]

Mr. Mockabee: Yes, sir.

Plaintiff's local counsel just about two or three days ago——

The Court: Let me interrupt you again. You said “allowance of fees to Mr. Graham.” There is no allowance of fees to any particular attorney.

When fees are allowed in this case they are allowed to the party.

Mr. Mockabee: I meant with regard to the services of Mr. Graham.

Mr. Leonard Lyon: I think that would be a disappointment to the attorneys, but I think that is what the law requires, your Honor.

The Court: Now, of course, you gentlemen, either side, can go into this question of whether Mr. Graham is a patent lawyer, but I warn you that the Court—in the Court's wide experience as a lawyer before I went on the bench I participated in one case, and I did not claim to be a patent lawyer; however, I tried a patent case before Judge Knox here in the District Court, doing the trial work with Mr. Gensler of Portland, who I think is now deceased.

Mr. Leonard Lyon: Geisler, G-e-i-s-l-e-r.

The Court: (Continuing) As my co-counsel. I tried the case before Judge Knox and won it here in the District Court.

So the Court might have various reactions, if [1157] there was a contention that a trial lawyer could not go into the District Court and win a patent matter.

I am not indicating what my reaction might be, but I think you ought to know what my experience was in this matter.

Mr. Mockabee: Mr. Graham can point out that he has been involved in considerably more than one patent case in his legal career.

Mr. Leonard Lyon: I would suggest, your

Honor, if counsel will entertain a suggestion from me, that we make speed in this matter by the defendant producing the charge slips or records of its attorneys that have devoted time to this case, and such evidence as it wants as to what would be a reasonable rate for those services, and that we dispose of it on that basis.

I think that is the usual way in which these things are decided.

The Court: Why do we need an opening statement here?

Mr. Mockabee: We intend to do that, but I think I could have gotten through with this thing if I hadn't been interrupted.

The Court: I interrupted you more than Mr. Lyon did, but go ahead.

Mr. Mockabee: I wasn't directing it towards the Court, your Honor. [1158]

I wanted to point out some remarks made by plaintiff's counsel in its opening statement at the beginning of the trial.

Not only were four of the six patents in suit withdrawn, but in its opening statement plaintiff's counsel stated that the Poux patent '017 in suit was in suit merely for the purpose of illustrating a method which allegedly was carried out by the machine patent to Silberman '793.

It seems to me that that patent could have been introduced, explained thoroughly by the plaintiff's expert, without requiring defendant to prepare a complete defense to a lawsuit, and that is what the defense of that patent meant.



The Court: Now, wait. I am like the fellow who said, "I can understand all but the therefore."

Plaintiff's counsel in their opening statement stated—do you have the words there?

Mr. Mockabee: Yes.

"Plaintiff is primarily"—

The Court: What is the page?

Mr. Mockabee: Page 2 of the transcript.

The Court: Hand me the first volume.

There doesn't seem to be a page 2. Page 1 is the name of the case, page 2 is the index but not numbered, page 3 is the record.

Mr. Mockabee: Then page 4, your Honor. [1159]

The Court: I suppose this is what you have been referring to. Page 5, line 4. Mr. Leonard Lyon after pointing out which of the claims, by the pretrial stipulation, were in suit, said:

"I might say, your Honor, that the plaintiff is primarily interested in this case in securing an adjudication in its favor on the second patent, the '793 patent.

"The earlier patent has expired?"—

That was the Poux patent.

"The earlier patent has expired and the real reason for keeping it in the case is because it furnishes a proper evaluation or its adjudication will furnish a proper evaluation and background for the second patent. In other words it has to be considered in connection with the second patent even though we should be willing to dismiss the first patent, and therefore we are asking that it be considered in the light of being adjudicated."

Is that what you are referring to?

Mr. Mockabee: Yes.

In other words, they could have used the Poux patent as a means of illustration, as they might use a chart or anything else, without requiring us to prepare a defense to the 14 claims of the Poux patent.

There were 20 claims in suit between the two patents, [1160] and 14 of them were in this illustrative patent to Poux.

The Court: All right. I have your point.

Mr. Mockabee: Then I also think the remark about the plaintiff being primarily interested in securing an adjudication of the Silberman patent has some bearing, an indication that plaintiff was not trying to protect any invasion of rights that might have harmed its business, but merely trying to set up the Silberman patent as a valid patent, a patent which they had just purchased, and as defendant maintains was one of their acts attempting to maintain domination of the industry.

Had there been an adjudication in favor of the plaintiff on the questions of infringement and validity, the defendant would have been out of business. Its financial position was such that he couldn't have dumped the alleged infringing machines on the market, or destroyed them and purchased non-infringing equipment, because of the position he was in. And feeling that New York City was the center of the zipper industry, he made inquiries there concerning patent counsel, and as a result of those inquiries Mr. Graham was retained.

I say that to give some reason for retaining New York counsel when the case was tried in Southern California.

Mr. Graham actively supervised and personally [1161] engaged in the investigation of the prior art, the questions of infringement and other matters necessarily involved in the defense of a patent suit.

During part of the time that Mr. Graham was of counsel in the case, Mr. Solomon Kleinman of this city was local counsel. He was not a patent lawyer, but merely served as the usual local representative of an out-of-town lawyer.

Mr. Robert Fulwider was also in the case for a matter of, I think, nearly two years. During that time there were some interrogatories propounded by defendant, which were prepared by Mr. Graham and forwarded to Mr. Fulwider, and I believe there was a deposition or two taken. But all this time the suit was controlled by Mr. Graham. The antitrust counterclaim, as I pointed out a moment ago, was not upheld by this Court, but the matters required to prepare that were equally important in the defense of the patent suit.

I was called into the case on or about January 26, 1955, or just about a month before trial. The proceedings had been going on more or less continuously since 1949. There was a considerable volume of prior art in this case, many papers and other matters to review, and a review of the prior art itself was a job, and during that month before trial it required an average of ten to eleven hours work per day, and included, I think, all but one

week end during that month, and then the trial consumed nine days. There were two [1162] week ends during the trial time in which I spent my entire time. There were two days during trial that I was in my office at 4:30 in the morning working on this case, and every evening after trial, and usually from about 8 o'clock until about 11:30 or 12 o'clock at night, and an hour to an hour and a half every morning, other than the two early mornings.

Subsequent to the trial we had two depositions which were taken and were introduced in the case, and it was necessary then to confer with Mr. Graham, and at considerable length with the president of defendant in the preparation of the briefs which were prepared partly by Mr. Graham, and partly by myself, and partly by Mr. Lipson.

I point those out, (1) to show that Mr. Graham took a very, very substantial part in the preparation of this case, and that the calendar time that I spent on it was rather short, but if it were stretched out into ordinary working days, it would have been probably several times the actual calendar time.

I have given the clerk several affidavits. First, the affidavit of Warren H. F. Schmieding, who has practiced patent law in Columbus, Ohio, for a number of years.

The Court: I read that.

Is there going to be objection to the use of the affidavit?

Mr. Leonard Lyon: I am not going to consent to the [1163] trial on affidavits, your Honor.

As far as Mr. Schmieding is concerned——



The Court: That is why I inquired.

Mr. Leonard Lyon: —I understand that he has, unfortunately, failed to satisfy the State Bar of California that he be admitted to practice in this state, and I don't think he is a competent witness.

Mr. Mockabee: Your Honor, I don't think that has anything to do with Mr. Schmieding's affidavit. Mr. Schmieding is a member of the Federal Courts in the State of Ohio, and he has a practice that he still maintains there.

The Court: Let's take one thing at a time.

How can you use affidavits, unless you have some understanding or stipulation to the use of affidavits?

Mr. Mockabee: I didn't consider this matter of affidavits such as you would use in support of a motion for preliminary injunction or for summary judgment, or anything like that. They are presented merely for the information of the Court to give an idea as to prevailing rates of charge by other attorneys.

If counsel wants to question the veracity, I suppose he can.

The Court: Are you ready to start with your proof now?

Mr. Mockabee: Yes, sir.

The Court: Do you offer the affidavit of Warren H. F. [1164] Schmieding?

Mr. Mockabee: Yes, sir.

Mr. Leonard Lyon: I object, your Honor, on the grounds it is incompetent.

The Court: Sustained.



Do you offer the affidavit of Edwin T. Bean?

Mr. Mockabee: Yes, sir, it is offered.

Mr. Leonard Lyon: Objection.

The Court: Objection sustained.

Do you offer the affidavit of Robert W. Fulwider?

Mr. Mockabee: Yes, sir, I do.

Mr. Leonard Lyon: The same objection.

The Court: Sustained.

Now, it is true that in injunction matters you can try matters by affidavit; but even then it is a touch and go proposition.

In the Smith, Kline and French case the Circuit sustained me on the matter, but they really labored it before they got through saying that I could grant that injunction on affidavits, and there had been no serious objection to the use of affidavits at the trial.

Mr. Leonard Lyon: That is right.

The Court: I don't think you can proceed in that manner on this issue, Mr. Mockabee.

Mr. Mockabee: I might interject I just received notice [1165] of a grant of a preliminary injunction on a design patent issued in April of this year, where there was not even an affidavit of the patentee.

The Court: Injunction matters are different from an issue of fact in the trial of an action. There may be a special rule that applies to injunction matters.

I just told you that the Circuit has sustained the use of affidavits in an injunction matter of that

sort, where we tried the preliminary and the final injunction at the one time.

Mr. Mockabee: I might ask counsel if he would be willing to stipulate that the three affiants would so have testified if placed upon the stand?

Mr. Leonard Lyon: I feel that I cannot do so, because the statements would have prompted cross examination on my part and they are not available for cross examination.

I am not questioning the veracity of the men.

The Court: Mr. Fulwider is here in town.

Mr. Mockabee: Yes, sir.

The Court: Who are these other men?

Mr. Mockabee: Mr. Bean is in Buffalo, New York, and Mr. Schmieding at the present time I think is in San Diego.

I could probably produce Mr. Fulwider.

The Court: What would happen if you called Mr. Lyon as an expert on patent fees? [1166]

I know of no patent lawyer in this community that is more respected and more eminent and more able. What about calling him as an expert?

Mr. Leonard Lyon: If your Honor please, I would like to respond to that in this way: I have already stated to the Court that I am embarrassed to have to be put in the position of questioning an attorney when he says his fee should be so much.

What I did when I received your Honor's notice of this hearing is I called Mr. Mockabee in and explained that to him, and said, "If you will suggest an attorney's fee which is within reason, I will recommend to my client that we accept it for the pur-

pose of this award." And he came back with some figure for Mr. Graham and some for himself, and I told him that I thought, particularly the ones for Mr. Graham, indicated that Mr. Graham was trying to make a windfall out of something that he wasn't entitled to, but if at any time they would suggest a reasonable figure, within reason, I did not want to be put in the position of contesting the matter.

I will be perfectly willing to state at any time what I think Mr. Mockabee's services would be worth if he will show me how much time he spent on the case.

The Court: Of course, you haven't answered my inquiry, Mr. Lyon, as to your availability to assist the Court as an expert on attorneys' fees. [1167]

Mr. Leonard Lyon: I am perfectly willing at the end of the evidence, if the Court wants to ask me what I think the fee should be, I am perfectly willing to so state.

The Court: I understood you to suggest earlier that it was your idea that we should approach this matter on the basis of time spent. Of course, you weren't listing all the factors. The time spent, eminence of counsel, difficulty of the case. We are all familiar with the elements that go into fixing a fee.

Mr. Leonard Lyon: That is right.

The Court: Were you suggesting we approach it on the basis of time spent and a reasonable amount on a per hour basis?

Mr. Leonard Lyon: I think a reasonable amount per hour basis means what is a proper rate for compensation of the man that did the job.

The cases hold that in the awarding of reasonable attorneys' fees the court can't do a mathematical precise job. There has to be some latitude in the matter.

Our Court of Appeals has indicated what the elements are to be taken into consideration, but my experience has been that as a practical matter if the attorneys will bring in their time slips and the court will look into the question of who they are, and what their experience and standing is, and so forth, the court has no difficulty in [1168] deciding what a proper rate for their time is. And if we can do that, I am perfectly satisfied with the amount of the award.

The Court: Are you going to proceed on the basis of telling me the amount of time that you and Mr. Graham and Mr. Fulwider put on this case?

Mr. Mockabee: As far as Mr. Graham and I are concerned, we are prepared, and I have Mr. Beehler here as an expert to testify as to what he thinks should be a proper rate of charge in a case of this type, and the amount of work involved, and so forth and so on.

The Court: Are you going to present evidence as to the amount of time Mr. Fulwider worked on the case?

Mr. Charles Lyon: If the Court please, at a previous hearing in this case we had in evidence Mr. Fulwider's bill for all of his services, and it was \$1,300.

Mr. Mockabee: That is correct.

Mr. Leonard Lyon: I don't believe there is any



use wasting time. That item was paid, and I have no basis for saying it wasn't reasonable.

Mr. Mockabee: And there was an item to Mr. Kleinman.

Mr. Leonard Lyon: The same thing for Mr. Kleinman.

The Court: Then let's see what we have got.

You say there was evidence put on previously that Mr. Fulwider had billed the defendant for \$1,300? [1169]

Mr. Leonard Lyon: And that amount has been paid by the defendant, I believe he testified.

The Court: Was that \$1,300 even?

Mr. Mockabee: \$1,374.35 is the figure that Mr. Lipson has furnished me.

Mr. Leonard Lyon: Perhaps the Court hasn't in mind this exhibit. You might like to read this exhibit before you go too far. (Handing document to the Court.)

The Court: So we get the record straight, without having to look up the record, can it be stipulated that Mr. Fulwider's bill for services rendered was \$1,374.35?

Mr. Leonard Lyon: Yes, your Honor.

We will further stipulate that that bill was reasonable for the services that he rendered.

The Court: What do we have in the record as to what services he rendered, so we can judge what part of the case he worked on?

Mr. Leonard Lyon: He was in the case——

Mr. Mockabee: Approximately two years.



Mr. Leonard Lyon: He was in the case up to shortly before Mr. Mockabee came in the case.

Mr. Mockabee: Immediately before.

Mr. Leonard Lyon: He handled the case here in Los Angeles after Mr. Kleinman got out, or with Mr. Kleinman, up until the time Mr. Mockabee came in the case. [1170]

The Court: Can it be stipulated that he was the Los Angeles counsel following Kleinman—

Mr. Charles Lyon: During the same time as Mr. Kleinman. He was patent counsel associated in Los Angeles. I was the active member in the case at that time, and I recall at the deposition of Mr. Lipson he attended that deposition, at the depositions of Mr. Detweiler, Mr.—the gentlemen whose depositions were taken concerning that meeting at the Talon offices when they discussed price fixing, all of those depositions.

Mr. Graham: Loew, Detweiler, Jager, Napp and Eisenberg.

Mr. Charles Lyon: He attended all of those depositions.

Mr. Graham: I would just like to correct a statement by Mr. Lyon, that Mr. Fulwider took those depositions.

As a matter of fact, I took all of the depositions. Mr. Fulwider made available his office to me for the purpose of taking the depositions, and on one or two occasions he would drop into the room while the depositions were being taken, but each deposition was taken by me.

Mr. Charles Lyon: You attended the depositions, but Mr. Fulwider did also.

The Court: Wait just a minute now. We want to shorten this record. Let's see what we can stipulate to.

First, Mr. Fulwider was in the case for [1171] approximately two years up to the time Mr. Mockabee took over; is that correct?

Mr. Leonard Lyon: Yes, we stipulate to that.

Mr. Mockabee: Yes, sir.

The Court: As I recall, Mr. Mockabee, you took over just shortly before the trial started.

Mr. Mockabee: On or about the 26th of January, 1955, and the trial was on March 1st.

The Court: Is that stipulated to?

Mr. Leonard Lyon: That is, your Honor.

The Court: Now, Mr. Fulwider was present at some of these depositions, but is it stipulated that Mr. Graham took the depositions, as he stated here?

Mr. Leonard Lyon: Certainly it is, your Honor.

The Court: And Mr. Fulwider was at least present at some of them?

Mr. Leonard Lyon: I don't want to be in the position of having to withdraw my stipulation that Mr. Fulwider's bill was reasonable, in view of Mr. Graham's statement that they just used his office, but that is not my understanding. My understanding is that Mr. Fulwider was in charge of the case here in Los Angeles as patent counsel with Mr. Kleinman up until Mr. Mockabee came into the case.

Mr. Charles Lyon: If your Honor will remem-

ber, there were numerous court appearances. This case was stayed at one [1172] time——

The Court: I remember. The thing that I want to get in the record is the person that actually asked the questions on these depositions was Mr. Graham.

Mr. Charles Lyon: I asked the questions on the deposition of Mr. Lipson.

The Court: I mean the questions on the other side of the case.

Mr. Charles Lyon: Yes.

The Court: Was Mr. Graham?

Mr. Charles Lyon: That's right.

The Court: But Mr. Fulwider was the Los Angeles attorney, and I suppose we could say in charge of the case here in this court?

Mr. Charles Lyon: That is correct.

Mr. Mockabee: That is true, Mr. Kleinman took no part in the case at all after Mr. Fulwider came in.

The Court: What can we agree to as to Mr. Kleinman?

Mr. Mockabee: I think the record shows——

The Court: It shows eight hundred——

Mr. Charles Lyon: \$890.

Mr. Mockabee: Stipulate to that.

Mr. Leonard Lyon: Page 1061 of the record, the transcript, reads:

“Mr. Lipson, did you hire Solomon Kleinman as an [1173] attorney?

“The Witness: Yes.

“The Court: Or did the corporation hire him?

“The Witness: Yes.

“The Court: Did you hire him before or after the present action was commenced?

“The Witness: After.

“The Court: The suit was filed on what date?

“Mr. Charles Lyon: October 17, 1949, your Honor.

“The Court: The action was filed October, 1949; how soon after that did you hire Mr. Kleinman?

“The Witness: A few days later.

“The Court: You have listed here under Exhibit BN—I think that is the exhibit you have before you—\$890. Have you paid that amount of money or agreed to pay him that amount of money?

“The Witness: I paid him that amount of money.

“The Court: That has actually been paid?

“The Witness: Yes.”

We are willing to stipulate that that amount of money was paid to Mr. Kleinman, and we do not question that that represents the reasonable value of his services.

Mr. Mockabee: Yes, your Honor.

The Court: Is that satisfactory?

Mr. Mockabee: Yes, your Honor. [1174]

The Court: Let's hear some evidence, then, as to the time Mr. Graham and Mr. Mockabee put on the case.

Mr. Mockabee: I will put it in in the order in which it occurred. I think Mr. Graham is ready to say something about his services.

Mr. Graham: Do you wish me to take the stand, your Honor, or speak from here?

The Court: I think you should take the stand.

Mr. Leonard Lyon: I am willing to waive that. I am willing to take Mr. Graham's statement on his oath as an attorney in the case. I don't want to be captious in the case, but I think I owe him that courtesy.

The Court: That is satisfactory, but you will be subject to cross-examination.

Mr. Graham: I understand.

Mr. Charles Lyon: May I make a suggestion?

In the case of Atiyeh vs. Filtex I had rendered weekly or monthly bills to my client; I showed them to Mr. Beehler, and that was accepted as the fee. If you have any such thing as that, why don't you show it to us and maybe we will take one look at it and say that is it.

Mr. Graham: There is in evidence at the trial bills that were rendered to Mr. Lipson.

Mr. Charles Lyon: We have them here.

Mr. Graham: I think they total something like nine [1175] thousand some odd dollars.

Mr. Leonard Lyon: We don't have any time slips on which those bills are based.

Mr. Graham: That is correct, you don't.

Mr. Leonard Lyon: And Mr. Lipson's cross-examination did not indicate that those bills were current bills, but they had all been rendered for the purpose of this case. They were bills gotten up just before the court hearing.

The Court: Exhibit BN showed a total of \$9,-617.34, but Exhibit BO in particular, said services rendered to you since February, '50 up to, but not



including the trial, \$7,500. Exhibit BP was services attending trial and conferring with Lipson and Mockabee \$500, plus some other items. Are those the two bills rendered that had a total of \$9,000?

Mr. Graham: They were the two bills rendered but I think there were some disbursements included in the bills which brought it up to that \$9,600 figure.

Mr. Leonard Lyon: The point that I wanted to make was that those were not current bills rendered at the time the services were rendered, but they were bills prepared for submission to this Court.

The Court: I understand.

Mr. Leonard Lyon: By Mr. Lipson.

The Court: I understand.

Mr. Graham: May I make a statement regarding those [1176] bills?

No monthly bills were rendered to Mr. Lipson while I was in the case for the good reason that most of the time he wasn't able to pay the bills, so I didn't bother rendering him monthly bills.

From time to time when he could do so he would send me some money.

All of the charges that were made to him when that figure of \$7,500 was arrived at, were made on a reduced basis as per an agreement I had, an oral agreement I had with Mr. Lipson that I wouldn't charge him my usual rates, because I knew his financial position was bad.

The Court: Let's keep our record straight as we go along now.

It has been understood that Mr. Graham may, in substance, testify without being sworn?

Mr. Leonard Lyon: With the same effect as if being sworn, and subject to cross-examination.

The Court: All right. Is it so stipulated?

Mr. Mockabee: So stipulated.

The Court: That applies to what he said up to now, as well as what will hereafter follow?

Mr. Leonard Lyon: Yes.

The Court: All right. [1177]

#### WILLIAM J. GRAHAM

being called as a witness, testified as follows:

The Witness: To begin with, I think you would like to have a little of my background and experience. I graduated from Fordham University Law School in 1932 and received an LL.B. degree. I was admitted to the bar in the State of New York in 1933. That admits me to practice in all of the courts of the State of New York. I have also been admitted to the United States District Court for the Southern District of New York, and for the Eastern District of New York, and the United States Circuit Court of Appeals for the Second Circuit.

I have also been specially admitted to the District Courts in Newark, New Jersey, the Western District of Virginia at Roanoke, Virginia. I am a member of the Association of the Bar of the City of New York, the New York County Lawyers Association, and the American Bar Association.

While I was studying law, and from 1927 to

(Testimony of William J. Graham.)

1934 I was employed by the firm of former Circuit Court Judge Mayer. The firm name when I first went with that office was Mayer, Warfield and Watson. The years while I was there the name changed several times. When I left there the firm name was Warfield, Frazer and Brown.

That firm specialized in patent matters.

While I was with the firm I was a law clerk, and [1178] later after I had been admitted to the bar I became a lawyer. Most of my work was research work on patent matters, patent litigation, patent opinions, and on one occasion I worked on a very important license agreement when vitamin D was first injected into foods.

The Court: You are talking now about this period '37——

The Witness: 1927 to 1934.

The Court: Part of which was prior to the time you were admitted to the bar and a year or so afterwards?

The Witness: About two years, yes, your Honor.

While with that firm I was also trial assistant on a number of occasions and spent a good bit of my time in the Federal Courts.

From 1934 to 1944 I was with the firm of Murray and Parker, which later became Parker and Graham. That was the firm I was with when I first entered this case. Mr. Parker had been an Examiner in the United States Patent Office for seven years before he went into private practice. He then became counsel for the American Flange and

(Testimony of William J. Graham.)

Manufacturing Company, which firm is still his client, but he went into private practice in about 1944, when I joined the firm.

Mr. Murray had been a patent lawyer with the firm of Penny, David, Marvin and Edwards. While with that firm my chief activity was taking care of all of the firm's litigation. [1179]

The Court: Did this include patent litigation?

The Witness: It included patent litigation, your Honor.

The Court: Did I understand you to say that you didn't claim to be a patent lawyer.

The Witness: I don't claim to be a patent lawyer, your Honor, in the sense that I wouldn't attempt to prosecute a patent application, and in that sense only.

The Court: But you have tried extensively litigation of patents?

The Witness: I have tried patent cases, your Honor.

I probably shouldn't use the word "extensively." I have been trial assistant in a great number of cases that I did not have charge of myself. But I have had patent cases, and as a matter of interest I have another patent case in this very court right now, which is going to be settled, so it won't be tried.

The Court: By "in this court," do you mean my court?

The Witness: I don't mean before your Honor,

(Testimony of William J. Graham.)

but in this United States District Court for the Southern District of California.

The Court: For what it is worth, I will express myself as follows: As far as a man having to process patents to be qualified to try a patent case, I have serious doubts. Many of these men who process patents couldn't possibly try a patent case. [1180]

Mr. Leonard Lyon: And vice versa.

The Court: And I feel that the competency to be recognized is the ability to try a patent case, and not one to prosecute a patent.

Mr. Leonard Lyon: One of the greatest patent lawyers in my time when I was first coming into the business was William K. White of San Francisco, and I worked with him a great deal when I was first breaking in, and I found out that he had never written a patent claim in his life, and I asked him why he hadn't, and he said he didn't think he could.

The Court: It takes a different type of skill, and it probably takes a different type of mind to effectively do the two jobs.

It may be that some men could do both.

I am not impressed with the fact that you never processed a patent.

Go ahead.

The Witness: In 1954 I left the firm of Parker and Graham——

The Court: You said '54?

The Witness: Yes, '54.



(Testimony of William J. Graham.)

The Court: You told me, or at least my notes show that you were with Murray and Parker from '34 to '44.

The Witness: I am sorry, your Honor. That was '44 to '54. [1181]

The Court: Where were you between '34 and '44.

The Witness: From 1934 to 1944 I was with the firm of Smith and Bowman.

The Court: You skipped that.

The Witness: I am sorry. I think I did, your Honor.

The Court: All right. Tell me about Smith and Bowman.

The Witness: Smith and Bowman was a firm in general practice. Part of their practice involved patent license agreements and some patent litigation. They had with them a patent lawyer by the name of Robert Irving Williams, who is now with the firm of Williams, Rich and Moss in New York City. I believe Mr. Rich has just been made a judge of the Court of Customs and Patent Appeals.

The Court: This was general practice with some attention to licensing agreements?

The Witness: There was a good bit of patent license work.

The Court: Then from '44 to '54 you were with Murray and Parker?

The Witness: That is right.

The Court: And Parker had been an Examiner?

(Testimony of William J. Graham.)

The Witness: In the United States Patent Office.

The Court: You mentioned he left the firm at a certain time?

The Witness: No, he didn't. He had been counsel, [1182] after he came out of the Patent Office he was counsel for American Flange and Manufacturing Company.

The Court: While a member of the firm?

The Witness: Before he became a member of the firm. And then he set up his own private practice.

The Court: In '44?

The Witness: Yes.

The Court: From '44 to '54 you were with Murray and Parker?

The Witness: That is correct.

The Court: In '54——

The Witness: In 1954 I came out on my own, left the firm and started practice as an individual practitioner. Since that time I have been trial counsel in matters of my own, and also on behalf of other attorneys. In matters of my own, involving patents; where I work for other attorneys, not involving patents, but just general commercial litigation.

The Court: How many patent cases have you participated in in the trial of the case.

The Witness: In the trial of the case? I will be guessing, your Honor, but I would say certainly from 15 to 20.

(Testimony of William J. Graham.)

The Court: All right.

The Witness: I don't know what other type of background information you may consider important. I could tell [1183] you who I represented if that would make any difference. I don't know whether the firms are known out here.

The Court: No, I won't need that. Tell me about your connection with this case now.

The Witness: The first entry that I had in my diary to indicate my connection with this case was on December 30, 1949 when I believe I had a letter from Mr. Kleinman, following a telephone call from Mr. Lipson in which he requested me to act on his behalf, and I asked him——

Mr. Leonard Lyon: If you are going to quote the substance of that letter, can we see it?

The Witness: I don't know whether I have the letter with me. I am not going to quote the substance of it. That is just how I got in the case, I received a letter from Mr. Kleinman following a telephone call from Mr. Lipson.

The Court: When do you consider that you were first employed in the case, what date?

The Witness: On or about December 30th.

I probably had a telephone call a day or two before that, before I received Mr. Kleinman's letter.

The work that I did in the case, I have made a summary here, and I will be glad to go into more detail if anybody wishes it.

The Court: Do you have it written out?

(Testimony of William J. Graham.)

The Witness: I have it written out in handwriting, [1184] your Honor, just my own handwriting, which is a digest of the service record that I have brought with me.

The Court: What is this service record?

The Witness: This service record is a list of entries made in my diary from time to time.

The Court: Was this diary a time record, or merely——

The Witness: It was a time record, substantially a time record.

Mr. Leonard Lyon: Have you the diary here?

The Witness: No, I don't. These items were transcribed from year to year, and I do have some of the later diaries. I don't have them here, but these are records that were made in my office, indicating——

Mr. Leonard Lyon: Can we see the time record or summary before it is offered?

The Witness: I have no objection at all.

The Court: I am going to take a short recess. Show counsel this document here.

As I understand this summary that you have typed up there, you represent to the Court it was made from old diaries from year to year, just pulling off your entries?

The Witness: Yes, in which I had made entries in pen and ink.

The Court: These entries were time records?

The Witness: That is correct. [1185]

The Court: They weren't merely a diary as you

(Testimony of William J. Graham.)

would keep on your desk showing people that you talked to?

The Witness: No.

The Court: But the nature of what work you did?

The Witness: That is correct.

The Court: Did you follow that practice with all your cases, of keeping some type of time record?

The Witness: I have done that.

At the end of every day I keep a time record of everything that I have done that day. I will put the name of the client and a brief digest of what I had done, then the time expended in doing it.

Mr. Charles Lyon: May I ask about this time record, what the figure in the righthand column is?

The Witness: Those are the hours.

The Court: You gentlemen look it over and talk it over. I will take a little recess.

(Recess taken.)

Mr. Leonard Lyon: If your Honor please, we are willing to accept the witness' statement that the tabulation of entries from his diary is a correct tabulation, and we are willing that it should be used in lieu of the diaries themselves, for the same purpose for which the diaries are used. I will have some cross-examination questions.

The Court: Can it be marked, then, as an exhibit and [1186] exhibited to the Court?

Mr. Leonard Lyon: It can, your Honor.

The Court: The next number would be BY.



(Testimony of William J. Graham.)

Received in evidence?

Mr. Graham: Yes, it is. I do offer it in evidence.

The Court: All right. Received.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit BY.)

The Court: What about this summary that you had made up in longhand?

Mr. Leonard Lyon: When I used the word "summary" perhaps I should say that we accept the tabulation as a correct transcript of the entries of the diaries.

The Court: All right.

Now, what about the summary that you had made up in longhand.

The Witness: This is just a digest of the work that I did do in the case.

It involved a study of the complaint, extensive correspondence with Mr. Kleinman and Mr. Lipson. This is more or less chronological, your Honor.

A considerable amount of preliminary research, advice to Mr. Kleinman with respect to motions that were made by him. A patent search, which was more than just the usual patent search. It was the usual patent search, plus. [1187]

I examined the files in a number of zipper infringement suits that had been brought in the City of New York and the Southern District of New York, and the Eastern District of New York, involving Talon, and also Conmar, and other zipper

(Testimony of William J. Graham.)

concerns, the names of which I don't remember now.

The research that I spoke of included research of law in connection with the defenses in patent cases, with particular emphasis on misuse, unclean hands, and the anti-trust defenses.

I also picked up whatever information I could about the zipper business from other attorneys who had been involved in cases, from literature that I could find, and that kind of thing.

I obtained file histories of Poux '017, and the Silberman patent in suit; gave careful study to them.

In addition, I conferred with my partner Mr. Parker about all of these matters from time to time. I then studied a mass of memoranda and correspondence received from Mr. Lipson relating to the various factual situations upon which the defenses of misuse, license, estoppel, and fraud in obtaining the patent were based.

I made some inquiries about Mr. Silberman, his background. I studied particularly the court file in the suit in which Mr. Silberman had been characterized as a [1188] commercial pirate. I had conferences from time to time with Mr. Ralph Meech, house counsel for Talon, in connection with various proposals to discontinue the suit or settle the suit.

I also prepared the amended answer to the complaint, which included the counterclaim.

I had considerable correspondence and telephone

(Testimony of William J. Graham.)

conversations with Mr. Fulwider, who was local counsel in the case.

Mr. Fulwider said at the outset that he didn't want to get into the case because of the defendant's financial condition.

When I say "into the case," he was willing to act as local counsel, but he didn't want to run up a lot of charges against the defendant, so he expected me to do most of the work and he would process it here.

I had a number of blow-ups made of prior art patent drawings, and actually did the marking myself of a lot of features in the prior art, which was similar to the Silberman invention.

On one occasion one day after the defendant's interrogatories had been propounded, I went to the Talon office in New York City and made a careful study of all of the agreements that they were required to produce in accordance with those interrogatories, and the following day dictated a memorandum of the points in the agreements that I thought [1189] were pertinent to the defense of this action.

Before the pretrial hearing was held in this case, Mr. Lipson informed me that he wanted me to come to attend the pretrial hearing and to prepare the pretrial memoranda. And I did considerable research and did prepare the pretrial memorandum that was filed with this Court.

Then I attended at the pretrial, and while I was here in Los Angeles I took the deposition of

(Testimony of William J. Graham.)

Messrs. Eisenberg, Jager, Detweiler, Napp and Loew.

I am trying to limit myself, your Honor, to the big things.

I prepared many affidavits in connection with the numerous motions that were made in this case.

I also took the deposition of Mr. Havakost in New York on two occasions. I took his deposition twice. The first time the stenographer's minutes were not produced and it was necessary to take the deposition over again.

Thereafter I had conferences in New York with Mr. Lipson, during which we prepared a lot of material for settlement proposals to be made to the plaintiff.

When Mr. Mockabee entered the case I assembled all of the material that I had collected from the beginning of the case and had extensive correspondence with Mr. Mockabee to familiarize him as much as possible with the case. Also telephone conversations. [1190]

When the trial approached, I assisted with the preparation for the trial, and also attended the trial for—I was here in Los Angeles for about five days, and I think actually here in court for only about two and a half days. During that period there were extensive conferences in the evening and the early morning hours with Mr. Mockabee and Mr. Lipson.

After the trial I also had a lot of correspondence with both Mr. Lipson and Mr. Mockabee. I pre-

(Testimony of William J. Graham.)

pared a large part of the brief that was submitted to the Court.

I also edited the analysis and charts prepared by Mr. Lipson, and also had correspondence and telephone conversations with Mr. Mockabee and Mr. Lipson in connection with the depositions that were taken after the trial.

After the plaintiff's reply brief had been filed, I believe I wrote your Honor a letter pointing out some errors in the briefs.

That summarizes the work that I did in this case.

You asked me before, your Honor, how many patent litigations I had taken part in. The figure I gave was correct. I would just like to say I have taken part in many other litigations which were not in the patent field.

The Court: What, in your opinion, is the reasonable fee per hour for work in this case, if we took the total hours of all work in this case, if we averaged it up and did [1191] not separate it. Could you give that kind of figure, or would you have to give a figure of office work and trial work?

The Witness: Mr. Lyon asked me what my standard rates were for office work and court work, and I told him the basic rate was \$25 per hour for office work and \$50 per hour for court work.

Mr. Leonard Lyon: That means time in court?

The Witness: Yes, time in court. And I also said to Mr. Lyon, and I will say to your Honor, that those are basic charges, and that I don't always limit myself to those charges, particularly



(Testimony of William J. Graham.)

in a case where litigation is successful for my client.

I would normally and normally do charge more than those basic rates, depending on the case and a lot of other circumstances.

The Court: You wouldn't make any distinction between the type of litigation; if you were in a contested piece of litigation involving a contract, or property, or tort, or antitrust law, your court work would be \$50 an hour, just the same as in a patent case?

The Witness: That is correct.

The Court: As a starting rate?

The Witness: As a basic rate, yes.

The Court: Have you made a segregation of the hours in Exhibit BY as to how many were court hours and how many [1192] were office hours?

The Witness: I have not, your Honor, but I don't think it would be a difficult matter.

The Court: Will you do that before the afternoon recess?

The Witness: I will be glad to.

The Court: I mean during the recess.

I am going to take an early recess, I have an appointment, so you will have plenty of time.

The Witness: All right.

The Court: What, in your opinion, is the reasonable value of all your services rendered for the defendant—strike that out.

Throughout this trial, as I said in my memorandum, we have talked about Lipson, services to Lip-

(Testimony of William J. Graham.)

son and things of that sort, when actually everybody meant the defendant Union Slide, and I think that went on again here this morning. It is understood that you are talking about your services to the defendant Union Slide?

The Witness: That is right. Defendant was represented by Mr. Lipson, and that is why I used Mr. Lipson's name.

The Court: And he is the mainspring in Union Slide.

Did you have some observations, Mr. Lyon?

Mr. Leonard Lyon: I have some questions to ask, but I don't want to interrupt. [1193]

The Court: I will be through in just a minute.

Mr. Leonard Lyon: All right.

The Court: Taking into account the nature of this case, its difficulty of problems presented, the character of the plaintiff, its standing economically in the community, the character of your client, the responsibility involved, the actual work done in the trial of the case, the questions presented, the result accomplished, what in your opinion is a reasonable fee for your services alone in this case?

Mr. Leonard Lyon: May I ask the Court to add another factor in that question?

The Court: What is that?

Mr. Leonard Lyon: Ask him, also, to take into account that after he had devoted all this time to the case, which he is evaluating, that he, in effect, ran out on the trial and required another man, Mr.

(Testimony of William J. Graham.)

Mockabee, to duplicate the work. I think that should be taken into consideration.

The Court: Take into account what actually transpired at the trial. You participated in a portion of the trial; that you were unable to continue throughout the trial; take into account the various counsel that were in the case, and Mr. Fulwider's services were terminated shortly before trial, that Mr. Mockabee, a younger lawyer, was put in the case to try the case; that you were not present at the major part of the trial; take into account all these facts which are in the [1194] record of this case, and you have been over the record, I take it, have you?

The Witness: Yes, I have.

The Court: All right. What, in your opinion, would be the reasonable value of your services?

The Witness: Before I answer that, your Honor, I would like to take exception to Mr. Lyon's remark that I ran out on the trial of the case.

What actually——

Mr. Leonard Lyon: I used that——

The Court: He meant nothing obnoxious about it. We understand the reasons. I think I do. That you have explained that you couldn't under the circumstances of the defendant. And I don't know whether you had other commitments, too.

The Witness: I did.

The Court: He didn't mean it obnoxiously, but you weren't here for part of the trial.

The Witness: That is correct.

(Testimony of William J. Graham.)

Mr. Leonard Lyon: He was only here two and a half days at the trial, your Honor.

The Witness: Actually, the arrangement to have Mr. Mockabee come into the case was adopted as an expedient, because of the limited means of the defendant.

Mr. Leonard Lyon: All that I want the witness to do [1195] is appreciate in his evaluating, in his own conscience, the value of his services to the defendant in this case—to take into account the fact that there was a duplication of work required between him and Mr. Mockabee, for the reason that he was unable to carry out the full case.

The Court: Take that factor into account.

What, in your opinion, is the reasonable value of your services?

The Witness: I would say, your Honor, from \$20,000 to \$25,000.

The Court: Now, you are also familiar with the work that Mr. Kleinman did?

The Witness: I am.

The Court: Since you were in the case from the inception.

The Witness: Yes.

The Court: And you are familiar with the bill that he rendered and that was apparently paid, and you are familiar with the work that Mr. Fulwider did, the bill for which was rendered and paid. And you are familiar with the work that Mr. Mockabee did?

The Witness: Yes.

(Testimony of William J. Graham.)

The Court: And you are familiar with the record in this case, and all the other factors that I have already enumerated that should be taken into account in evaluating a [1196] reasonable fee, including the factor which Mr. Lyon has called attention to, that there was obviously some duplication when Mr. Mockabee had to familiarize himself with the case. And you may in the same vein take into account the fact that you are not a member of the bar of this court and you would have had to have local counsel under our rules to, at least, be the nominal counsel in the case. Take into account that Mr. Fulwider's services were terminated and Mr. Mockabee, a new lawyer, came in. What in your opinion would be the reasonable value of all the legal services rendered in the case?

The Witness: I would say, your Honor, from \$40,000 to \$45,000.

If I may, I would like to make one statement.

When I was first brought into this case, it was for the express purpose of preventing Mr. Lipson, or preventing Union Slide Fastener from having to go out of business, because if the charges against them had been sustained they were in such a position that there wasn't anything they could do but fold up.

The Court: That comes under the element of responsibility and the result accomplished?

The Witness: That is correct.

The Court: That comes under that element.

Gentlemen, this is my vacation, as you know. I



(Testimony of William J. Graham.)

[1197] have some personal problems. If you don't mind, I would like to take a recess now until 2 o'clock.

Mr. Leonard Lyon: That is perfectly all right.

Mr. Mockabee: Yes, sir.

The Court: That will give you some time to confer further, and then I take it we can have cross-examination of Mr. Graham.

Mr. Leonard Lyon: I have some questions. I don't like to put it in the form of cross-examination.

The Court: It is courteous cross-examination of opposing counsel.

Mr. Leonard Lyon: I hope it will be so.

The Court: All right. 2 o'clock.

(Whereupon an adjournment was taken to reconvene at 2 o'clock of the same afternoon.)

Thursday, August 2, 1956, 2:00 P.M.

The Court: Had you finished your statement, Mr. Graham?

### WILLIAM J. GRAHAM

resuming the witness stand, testified as follows:

The Witness: Your Honor, you asked me if I had made a breakdown of the hours spent in court and the hours spent in the office. I hadn't at the time you asked me, but I have during the recess.

The Court: All right.

The Witness: I have 67½ hours of court time.

Now, I included in court time, time actually in court or wholly away from my office for taking dep-

(Testimony of William J. Graham.)

ositions. The balance of the time is office time 357¾ hours.

The Court: Thank you.

Have you completed your statement?

The Witness: I have, your Honor.

The Court: All right. Mr. Lyon is going to question you. Do you want to sit up here, or would you be more comfortable standing.

The Witness: It doesn't matter.

The Court: Then come up here. You may be more comfortable. [1199]

### Cross Examination

Q. (By Mr. Leonard Lyon): Mr. Graham, you have told us that in December, 1949 you made your agreement with Mr. Lipson upon what basis you would represent the defendant in this case. Was that agreement reduced to writing?

A. No, it was not.

Q. Was it made in New York with Mr. Lipson present?

A. I would say that it was made over a period of time, during the course of the first telephone conversation I had with him and then later when I saw him in New York.

Q. How much later?

A. I think the first time I actually met Mr. Lipson was in the latter part of 1950.

Q. Can you tell us in your own words as best you can the terms of that agreement?

A. Well, I have called it an agreement. Actu-

(Testimony of William J. Graham.)

ally, it was a discussion during which Mr. Lipson told me that he had limited financial resources and that he couldn't afford to pay large fees, and that he needed legal assistance. And I told him that I would render legal assistance to him at reduced rates. I wouldn't make my usual charges to him, but that if the case terminated successfully I would expect to be compensated fully for my efforts.

Q. Was any figure stated or agreed upon as to what [1200] those reduced rates were to be?

A. Well, we talked from time to time on occasion when I first met him, and when I saw him later, again, in New York, I told him that I had charged him at half of my usual rates up to that point.

Q. What do you mean you had charged him half of your regular rate up to that point?

A. Whenever I asked him for money, I would tell him that I would make a charge for certain work that I had done up to that date, and that the charge was made at a reduced rate.

Q. Did you make those charges in the form of written bills sent to the defendant?

A. On some occasions, yes.

Q. I show you Exhibits BP and BO in this case, Defendant's Exhibits, which are bills you rendered on February 28, 1955 and March 9, 1955; had you presented any bills covering the same services to Mr. Lipson, in writing, before those bills?

A. I had presented Mr. Lipson with a few bills

(Testimony of William J. Graham.)

for odd amounts like \$350, \$500. Those charges were included in this over-all charge of \$7,500.

Q. Were those bills for services or for disbursements?

A. Usually for services and disbursements.

Mr. Leonard Lyon: I would like, your Honor, to ask [1201] the defendant to make those bills available to me now for use on cross-examination of this witness.

The Court: Do you have them here?

The Witness: I don't have my copies, your Honor. I don't know whether Mr. Lipson has them.

Mr. Mockabee: Mr. Lipson doesn't have those bills in Court, your Honor.

Mr. Leonard Lyon: Do I understand that the bills are not available, your Honor?

The Court: That is what I understood. Mr. Graham says he does not have them, and Mr. Lipson says he does not have them.

Q. (By Mr. Leonard Lyon): Will you, as near as you can recollect, tell us the date of the bills that we are referring to?

A. Well, I can tell you that the first bill was rendered sometime in the early part of 1950.

Q. For how much?

A. My recollection is \$350.

Q. And it covered expenses or services?

A. Services.

Q. And the services between what dates?

A. From the time that Mr. Lipson first called

(Testimony of William J. Graham.)

me on the telephone, I think until April. I am just guessing, Mr. Lyon. I can't be exact about it.

Q. How many hours?

A. I can't recall that.

Q. And what rate per hour?

A. I can't recall that. I know that it was at a reduced rate.

Q. You say it was a reduced rate, but you can't remember what rate?

A. Without the bills, I can't remember.

Q. It covered your services through April, 1951?

A. My recollection is that it covered services up to April of 19——

Q. Through April or up to?

A. Up to April.

Q. And that, according to Exhibit BY, would cover how many hours, using this transcript from your diary?

A. It appears from Exhibit BY that the hours spent in 1949, 1950—my recollection is now that it was probably in April of 1951 that this bill was rendered. But without the bills I can't recall exactly.

Q. And you can't recall how many hours the bill covered? A. No, I can't.

Q. And you can't remember at what rate per hour the bill was based?

A. All that I do recall is that it was at a reduced [1203] rate.

Q. You don't remember what the rate was?



(Testimony of William J. Graham.)

A. About half.

Q. Do you remember what the second bill was that you rendered? A. No, I do not.

Q. You don't remember what date it was, or approximately the date?

A. I might be able to tell from the exhibit.

Q. I wish you would, if you can.

A. It was probably in the latter part of 1951 after interrogatories to the plaintiff had been prepared.

Q. Do you remember the amount of that bill?

A. No, I do not.

Q. Do you remember the number of hours it covered? A. No, I don't.

Q. Did you render any subsequent bill between that bill and the bill constituting Exhibit BO?

A. I believe that I did.

Q. Can you tell us when? A. No, I can't.

Q. Can you tell us the amount or the time on those bills? A. No, I can't.

Q. Other than this first understanding, this oral [1204] understanding that you say you had with Mr. Lipson about December, 1949 and immediately following, have you ever had any other understanding with Mr. Lipson or the defendant regarding the basis for your services in this case?

A. No, I don't think so.

Q. Have you any agreements with him at the present time that you will be paid any specific sum, other than just this first original agreement for your services in this case? A. No.

(Testimony of William J. Graham.)

Q. I have a few questions that I am requested to ask you, that I have already asked you in a meeting between us, but I would like to have for the purpose of the record.

Mr. Lipson testified that he was referred to you because he wanted somebody experienced in the zipper art. What experience had you had in the zipper art before December, 1949?

A. I had had very little experience in the zipper art before 1949.

Q. You testified that you made an investigation and that you located various prior art patents and matters that are referred to in the answer and the amended answer in this case, did you not?

A. Yes, I did.

Q. Had you any knowledge of those matters before you were employed by Mr. Lipson in this case? [1205]

A. No, I did not.

Q. I believe you testified that you learned of those matters by investigating the files of cases that Talon had been a party to in the New York courts and maybe elsewhere?

A. Well, in the first place, I haven't testified to that yet, but I will testify now that that was one of the sources of my information, by studying the files in other cases that had been instituted in New York City by Talon, and also cases involving Conmar and other zipper patent infringement suits.

Q. For the purpose of the record will you confirm what you have told me, and that is that you

(Testimony of William J. Graham.)

have not been paid by anybody else for any of those services?

A. That is 100 per cent correct.

Q. How much money have you been paid on account of your services in this case by the defendant to date?

A. If I can see the exhibit that was introduced in evidence, being a statement by the accountant of Union Slide Fastener, there is a statement of the amount in there that has been paid to me.

(Document handed to the witness.)

The Witness: This is not the exhibit I am referring to. The accountant's statement.

The Court: This here?

The Witness: That's right. [1206]

The Court: Give the number of it?

The Witness: That is BN, Exhibit BN.

I thought the amount had been stated here, but the over-all bills are stated. On Exhibit BP I indicate the receipt of the sum of \$2,312.10. I should correct the exhibit number. That is BO and not BP.

In addition, I indicate the receipt of \$350 on Exhibit BP. So that the total amount that I believe that I have received is \$2,662.10, which includes disbursements of \$776.45.

I understand there was testimony in this case by Mr. Lipson that he had paid another \$700, which I had not given him credit for. And that may be.

Q. You are not sure?

A. I am not sure.

(Testimony of William J. Graham.)

Q. I believe you have testified that over the years '50 to '55 your regular per diem rate that you charged uniformly to your clients was \$25 per hour for office work and \$50 per hour for court work, is that correct? A. That is correct.

Q. Did you consider that and do you consider that a reasonable charge for the value of your services? A. I do.

Q. I believe you have also indicated that there was some expectation or hope on your part that you would be given [1207] some further compensation in case of a successful outcome of the case?

A. Well, that was based upon my regular practice, that if I do handle litigation and the result accomplished is beneficial to the client, I do expect to receive more than my hourly rate.

Q. Did you ever accomplish that enjoyment in a patent case in your experience?

A. Yes, I have.

Q. What case?

A. Well, if I can recall, the name of the party that I represented was the Stratford Pen Company, and I believe that the plaintiff was one of the large pen companies. I can't remember the name of it now.

Q. Were you for the defendant?

A. I was for the defendant.

Q. Had you expressed agreement to the effect that you would serve the defendant at a certain rate, and if successful be paid more money?

A. Well, it happened in that case I had no

(Testimony of William J. Graham.)

agreement, I had no special agreement at all. I used to render bills as I rendered services.

Q. At what rate were you charging the client there?

A. The same charge that I indicated is my basic charge. [1208]

Q. How much was your total bill to the client in that case based on your per diem rate?

A. I have forgotten that completely. I can't tell you.

Q. How much additional compensation was paid you because of the successful outcome of the case?

A. I don't remember the exact amount of that, either?

Q. Is that the only event of that kind that has happened to you in your experience in patent cases?

A. That is the only one I recall immediately. If I had a little more time I might think about some more.

Q. On the basis of your regular charge of \$25 per hour if applied to the transcript of your diary, Exhibit BY, how much would your fee be in this case?

The Court: That is a matter of computation.

Subject to your check, I computed \$3,325 for court work.

Mr. Leonard Lyon: And on the basis of your time in court——

The Court: That was court work. I only took 357 hours. I didn't take into account the three-



(Testimony of William J. Graham.)

quarters. I computed \$8,925 for office work. A total of \$12,250.

Does that correspond with yours?

Mr. Charles Lyon: My computation was \$12,312.50. It is about the same thing.

The Court: I may be wrong, and you may be right. [1209]

Mr. Charles Lyon: I could be just as wrong as you might be.

The Court: Anyhow, we both agree it is something over \$12,000.

Mr. Charles Lyon: Yes.

Q. (By Mr. Leonard Lyon): Mr. Graham, have you any way, either with or without your diary, or the transcript from your diary, of estimating how much of your time devoted to this case was devoted to the counterclaim in this case?

A. I have no way of breaking that down, Mr. Lyon, no.

Q. Have you any way of distinguishing between the individual defenses in this case, what time you devoted to the individual defenses in this case?

A. No, I have no way of breaking that down.

Q. When you stated that you wanted to take into consideration, in fixing a reasonable fee in this case, the extraordinary outcome of the case, if you used that phrase——

A. I didn't use that.

The Court: I don't think he used that.

Mr. Leonard Lyon: Well, anyway, the outcome of the case.

(Testimony of William J. Graham.)

The Court: Favorable outcome, is that what you were talking about?

The Witness: Favorable.

The Court: Do you look upon the outcome as extraordinary, Mr. Lyon? [1210]

Mr. Leonard Lyon: I think so.

The Court: We are not in agreement on that. But I think the question that I asked was "favorable outcome."

Mr. Leonard Lyon: Maybe we are using the term "extraordinary" and "favorable" in different senses. The Court in one sense and I in another.

The Court: I am using the word "extraordinary" in the common, ordinary accepted sense, namely, something that would not be expected, that would be out of the reasonable anticipation of a reasonable man, and so forth. Do you use the word "extraordinary" in that sense?

Mr. Leonard Lyon: I was using it in the sense of accomplishing something in a lawsuit that wouldn't be expected to be accomplished ordinarily.

The Court: We are not far apart in our definitions.

(The last question was read by the reporter as follows: "Q. When you stated that you wanted to take into consideration, in fixing a reasonable fee in this case, the extraordinary outcome of the case, if you used that phrase——")

Q. (By Mr. Leonard Lyon): Did you also take into consideration——